In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 333

ANTHONY PINO, PETITIONER

v.

HENRY NICOLLS, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 23-40) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1954. The petition for a writ of certiorari was filed September 9, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

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QUESTIONS PRESENTED

1. Whether petitioner, an alien, was "convicted" of larceny in Massachusetts within the meaning of Section 241(a)(4) of the Immigration and Nationality Act of 1952 where, a year after he had been found guilty and given a suspended sentence of one year, the sentence was revoked and the case placed "on file."

2. Whether deportation of an alien under Section 241(a)(4) of the Immigration and Nationality Act of 1952 can be based on a conviction prior to the effective date of the act.

3. Whether petit larceny is a crime involving "moral turpitude" within the meaning of Section 241(a)(4) of the Immigration and Nationality Act of 1952.

4. Whether the introduction of petitioner's criminal record showing numerous arrests for other crimes invalidates the hearing at which petitioner was, on the basis of undisputed facts, found deportable.

STATUTES INVOLVED

The Immigration and Nationality Act of June 27, 1952, Section 241(a) (66 Stat. 204, 8 U.S.C. 1251(a)), provides in relevant part that:

> Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> * * * *
>
> (4) is convicted of a crime involving moral turpitude committed within five years after

entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial.

8 Code of Federal Regulations, Section 242.53 (b) provides as follows:

> (b) *Special inquiry officers; general duties.* The special inquiry officer shall conduct a fair and impartial hearing. No decision of deportability shall be valid unless based upon reasonable, substantial and probative evidence. He shall exclude from the record any evidence that is irrelevant, immaterial, or unduly repetitious. In his discretion, he may exclude from the record any argument in support of objections, but in such event, the respondent may submit a brief in support of objections. * * *

STATEMENT

On December 18, 1953, petitioner was taken into the custody of respondent, a District Director of the Immigration and Naturalization Service of the Department of Justice, pursuant to an order of deportation issued on a finding that he had twice been convicted of crimes involving moral turpitude (R. 3). Contending that this order was invalid, petitioner on the same date, December 18, 1953,

filed a petition for a writ of habeas corpus (R. 1, 2-12). The District Court issued the writ, held a hearing, and on February 1, 1954, entered an order discharging the writ and dismissing the petition (R. 104). This order was affirmed by the Court of Appeals on August 2, 1954.

The evidence against the petitioner, found by the Special Inquiry Officer (R. 64-74) and the Board of Immigration Appeals (R. 76-95) to be true, was substantially as follows:

Petitioner is an alien who was born in Italy in 1907. He was admitted to the United States in 1908 for permanent residence and has maintained his residence in the United States since that time.

In December 1948, in a District Court of the Commonwealth of Massachusetts, petitioner was charged with having stolen twelve golf balls. He entered a plea of not guilty, but was found guilty and sentenced to one year in the House of Correction. Appeal was taken on December 27, 1948, but on December 28 was withdrawn by leave of court and a motion for a new trial was filed and allowed. On January 4, 1949, he was again found guilty, and again sentenced to one year in the House of Correction. An appeal was filed on January 10, 1949, but on January 28 the appeal was withdrawn by leave of court and the sentence suspended, and petitioner was placed on probation. On January 30, 1950, appeal was waived, the sentence revoked, and the case placed "on file." (See Exhibit 5, R. 57-58, 18-19.)

It was also shown that earlier, in January, 1928,

petitioner had been indicted by a grand jury in Suffolk County, Massachusetts, for abuse of a female child. He entered a plea of not guilty, but he was found guilty as charged and sentenced to be committed in a Massachusetts Reformatory for a period of five years and one day (Exhibit 6, R. 59-60, 19).

The warrant of arrest in the immigration proceedings had charged a prior conviction for rape, but at the deportation hearing it developed that the conviction was for abuse of a female child. A new charge was lodged during the hearing to conform to the actual facts (R. 20), and the Inquiry Officer permitted the petitioner additional time to respond. Petitioner objected that this lodging of a new charge indicated that the inquiry officer was acting as an investigative rather than a judicial officer, which was improper under the regulations of the Immigration and Naturalization Service. In this connection, petitioner also charged at the hearing that the Inquiry Officer had before him papers which were not introduced at the proceeding; that he was improperly relying on those papers and thus in fact acting as an investigative officer with respect to petitioner's case (R. 21-23). The Inquiry Officer would not disclose the contents of the papers but indicated that his only consideration of the record in the case was to familiarize himself with the facts so that he could act as a judicial officer (R. 28).

In addition the Special Inquiry Officer placed in the record two reports, one by the Federal Bureau

of Investigation and one from the Massachusetts Board of Probation, which showed petitioner's long criminal record consisting mostly of arrests on charges for which he had not been convicted. These records were admitted over the petitioner's objection on the Inquiry Officer's view that they were merely "cumulative evidence" (R. 25-26).

ARGUMENT

1. Petitioner contends that he has not been convicted of two crimes involving moral turpitude within the meaning of Section 241(a)(4) of the Immigration and Nationality Act of 1952 because, on the larceny charge, there was no sentence imposed and the case was put "on file" without final disposition.

Petitioner was tried on a plea of not guilty and found guilty of larceny of a dozen golf balls in a District Court of the Commonwealth of Massachusetts. That court, after two unperfected appeals, and a second trial, sentenced him to one year's imprisonment, suspended the sentence, and placed him on probation for a year. At the end of the year, the court revoked the sentence and placed the case on file.

So far as we have been able to determine, authority to place a case on file stems from Section 38 of Chapter 218 of the Laws of Massachusetts, which provides for the sittings, adjournments and continuances of cases, and then states:

> * * * Subject to any other provisions of law relative to the filing of complaints for partic-

> ular crimes, district courts may place on file any complaint in a criminal case other than a complaint for the commission of a felony issued against a person who appears previously to have been convicted of a felony or previously to have had a complaint for felony placed on file.

This statute apparently authorizes what has long been a common practice in Massachusetts. It was explained in *Commonwealth* v. *Dowdican's Bail,* 115 Mass. 133, 136, as follows:

> It has long been a common practice in this Commonwealth, after verdict of guilty in a criminal case, when the court is satisfied that, by reason of extenuating circumstances, or of the pendency of a question of law in a like case before a higher court, or other sufficient cause, public justice does not require an immediate sentence, to order, with the consent of the defendant and of the attorney for the Commonwealth, and upon such terms as the court in its discretion may impose, that the indictment be laid on file; and this practice has been recognized by statute. Sts. 1865, c. 223; 1869, c. 415, §60. Such an order is not equivalent to a final judgment, or to a *nolle prosequi* or discontinuance, by which a case is put out of court; but is a mere suspending of active proceedings in the case, which dispenses with the necessity of entering formal continuances upon the dockets,

> and leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward and pass any lawful order or judgment therein.

The issue is whether the disposition of petitioner's case by placing it on file prevents it from being a conviction within the meaning of Section 241(a)(4). The Court of Appeals, in a unanimous opinion by Chief Judge Magruder, held that it did not.

Petitioner's discussion of the interpretation of the word "conviction" by the Supreme Judicial Court of Massachusetts is largely irrelevant. "Conviction" is used sometimes to refer to the adjudication of guilt, as distinguished from the sentence, and sometimes more broadly to encompass the sentence. As the various Massachusetts cases cited show, the resolution of which of the two meanings of "conviction" is intended depends on the purpose and context of the statute involved. Here, as the Court of Appeals held, the meaning of the word "convicted" in the Immigration and Nationality Act is a federal question, and state decisions, even if they were more explicit than they are, would not be controlling.

The earlier immigration law had authorized deportation only of aliens who had been convicted *and* sentenced to imprisonment (8 U. S. C. (1946 ed.) 155). The change in the present act to provide for deportation where there has been conviction of two crimes, regardless of whether confinement

was imposed, reflects the policy of Congress to make deportable persons who are twice convicted, even though as to one or both crimes extenuating circumstances might cause a judge merely to put a defendant on probation.

In this context, the court below thought it clear that conviction, as used in the Act, refers to an adjudication of guilt. On such a construction of the Act, a distinction ought not to be drawn between a case where the sentence was suspended and the defendant put on probation, and a case, like the present, where, after one year's probation under a suspended sentence, the sentence was revoked and the case was put "on file." Indeed, it seems very clear that the "on file" status under Massachusetts law is akin to probation.[1] It is sometimes imposed because of conditions which throw some doubt on the state of the law. It may be imposed because of the court's judgment of the defendant's merits. In any event, the status of the case as on file may be ended by the court on appropriate notice to the defendant.

Weighing against petitioner is the fact that the case could not have been left on file without his consent. Petitioner could at any time have reactivated the case and taken an appeal to contest the validity of the adjudication of guilt (see *Dowdican*

[1] It is noteworthy that the Supreme Judicial Court of Massachusetts has at least intimated that placing a case on file may be the same as suspension of sentence (*King* v. *Commonwealth*, 246 Mass. 57) or probation (*Finer* v. *Commonwealth*, 250 Mass. 493, 497).

case quoted *supra*, p. 7). Thus there is of record an adjudication of guilt, which the placing of the case on file has clearly not wiped out, and which petitioner has not attempted to have wiped out. Although the matter is not altogether free from doubt, we believe the court below was warranted in holding that petitioner is within the deportable category of those "convicted" of two offenses involving moral turpitude. In any event, the question lacks sufficient importance to justify further review.

2. The answer to petitioner's contention that convictions, as a basis for deportation under Section 241(a)(4) of the Immigration and Nationality Act, must have occurred after the effective date of the Act, is that Section 241(d) explicitly provides that, except as otherwise provided in the section, the whole of Section 241 has application to events which preceded the Act. It states:

> Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a) of this section, notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act [June 27, 1952], or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a) of this section, occurred prior to the date of enactment of this Act [June 27, 1952].

Petitioner argues at some length that the reference in subsection (a)(4) to an alien who "is" convicted must mean convicted after the effective date of the Act. He points out that other subsections refer to having done certain things "at any time after entry" or use the present participial form. Since convictions remain of record after punishment has been served, an alien with past convictions is an alien who "is convicted" within the literal language of Section 241(a)(4). Moreover, as noted, petitioner's contention is contrary to the clear language of subsection (d) that subsection (a) shall be applicable, notwithstanding that the alien entered the United States prior to June 27, 1952, and notwithstanding that the "facts" which bring an alien within any of the "classes" enumerated in subsection (a) "occurred prior to" June 27, 1952.

The "except as otherwise specifically provided in this section" clause of subsection (d) makes it clear that the only parts of subsection (a) that are to be considered exclusively prospective are those which are *specifically* applicable only to future acts or occurrences. Subsection (a)(3), providing for the deportation of an alien who "hereafter, within five years after entry, becomes institutionalized at public expense because of mental disease," is an example of specific language limiting the application of a particular provision to future occurrences. This sharply contrasts with the "is convicted," upon which petitioner relies, appearing

in paragraph (4). This contrast emphasizes that the "is" in paragraph (4) is not language "specifically" removing that paragraph from the operation of subsection (d).

3. Petitioner next contends that the offense of theft of a dozen golf balls does not involve moral turpitude.[2] Congress has not specifically enumerated the offenses which involve moral turpitude. Nor has it in terms declared that the circumstances in which a crime was committed are irrelevant in determining its moral quality. As a *de novo* proposition it might appear appropriate, and consistent with the legislative policy embodied in the provision, to hold that petit larceny could in some circumstances be regarded as not necessarily involving moral turpitude. But in the relatively few cases where this question has been raised, the lower federal courts have uniformly stated that larceny, of whatever degree and in whatever circumstances, involves moral turpitude. *Tillinghast* v. *Edmead*, 31 F. 2d 81, 83-84 (C.A. 1); see also *Wilson* v. *Carr*, 41 F. 2d 704, 706 (C.A. 9); *United States ex rel. Ulrich* v. *Kellogg*, 30 F. 2d 984, 986 (C.A. D.C.); *United States ex rel. Patricola* v. *Karnuth*, 9 F. Supp. 961, 962-963 (W.D. N.Y.); *United States ex rel. Fracassi* v. *Karnuth*, 19 F. Supp. 581, 583-584 (W.D. N.Y.); *United States ex rel. Rizzio* v. *Kenney*, 50 F. 2d 418 (D. Conn.). Such a construction

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[2] The contention that "moral turpitude" as a standard is void for vagueness was rejected by this Court in *Jordan* v. *De George*, 341 U. S. 223, 229-232.

of the statute, though it doubtless could in some cases lead to harsh and oppressive results, cannot, therefore, be rejected by the Government as an erroneous interpretation of the legislative will. Moreover, we cite the comment of Chief Judge Magruder for the Court of Appeals on this point (Pet. 37-38):

> There is some force in the comment by Judge Anderson, dissenting, in *Tillinghast* v. *Edmead, supra* (at p. 84): "It seems to me monstrous to hold that a mother stealing a bottle of milk for her hungry child, or a foolish college student stealing a sign or a turkey, should be tainted as guilty of a crime of moral turpitude." Indeed, it is possible to conceive of circumstances under which almost any crime might be committed from the purest of motives, motives, however, which the law does not accept as a defense. But here again, with considerations of administrative workability in mind, Congress has painted with a broad brush. If the crime in its general nature is one which in common usage would be classified as a crime involving moral turpitude, neither the administrative officials in a deportation proceeding nor the courts on review of administrative action are under the oppressive burden of taking and considering evidence of the circumstances of a particular offense so as to determine whether there were extenuating factors which might relieve the offender of the stigma

> of moral obliquity. * * * Congress did not overlook the possibility of extenuating circumstances in the particular case [as appears from exceptions of section 241(b) of the Immigration and Nationality Act] * * *.

4. Petitioner's final contention is that the conduct of the administrative proceedings was in violation of regulations of the Immigration and Naturalization Service in that the Special Inquiry Officer did not act in a judicial capacity as he was required to do under 8 C.F.R. § 242.61. Specifically, he points to the fact that the Special Inquiry Officer, in answer to petitioner's objection at the hearing to the officer's question as to the number of times he had been arrested, stated (R. 17):

> A deportation hearing has the intent of determining whether or not the respondent is deportable on the charge contained in the warrant of arrest or under any charge contained within the provisions of the Immigration and Nationality Act.

In addition, he relies on the fact that the Special Inquiry Officer permitted the introduction, as "cumulative evidence," of two reports of petitioner's past criminal record which contained "investigative leads."

Although neither the hearing officer nor the Board of Immigration Appeals relied upon the reports, petitioner urges that their admission, to-

gether with the Inquiry Officer's statement that he was not limited to the charge contained in the warrant of arrest, indicate that the officer did act in an investigative as well as judicial capacity, and rendered the hearing accorded petitioner unfair.

Petitioner's contentions are unsound. In a habeas corpus proceeding only those errors which affect the fundamental fairness of the procedings are relevant. *United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, 106; *Tisi* v. *Tod,* 264 U. S. 131, 133-134. Petitioner does not contend, and he cannot, that the errors of which he complains affected in any way the question of his deportability as a matter of law. The issues as to whether the crimes for which petitioner had been convicted involved moral turpitude and were in fact convictions arise on undisputed facts and depend upon application of legal principles which are subject to review by the courts. Hence, the admission of irrelevant evidence of petitioner's criminal record or the attempt to discover whether there were grounds for petitioner's deportation other than those charged in the warrant of arrest could not have affected the essential issues resolved at the hearing.

CONCLUSION

The order of deportation in this case complied with the requirements of law. No question warranting review by this Court is presented. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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Supreme Court of the United States.

OCTOBER TERM, 1954.

No. 333.

ANTHONY PINO,
Petitioner,

v.

HENRY NICOLLS, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONER.

Opinions Below.

The decision and order of the Special Inquiry Officer (R. p. A64) and the decision of the Board of Immigration Appeals (R. p. A75) are unreported. The opinion of the District Court (R. p. A104) is reported at 119 F. Supp. 122. The opinion of the Court of Appeals (R. p. 128) is reported at 215 F. (2d) 237.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 2, 1954 (R. p. 143). The petition for a writ of certiorari was filed September 9, 1954. The petition was granted November 8, 1954 (R. p. 144). The jurisdiction of this court is invoked under 28 U.S.C. sec. 1254(1).

Constitutional Provisions, Statutes and Regulations.

1. Section 241(a)(4) of the Immigration and Nationality Act, 66 Stat. 204, provides:

> "(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> . . . . . .
>
> "(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;"
>
> . . . . . .

2. Also involved and set out in Appendix B are the Fifth and Eighth Amendments to the United States Constitution and a portion of section 242(b) of the Immigration and Nationality Act, 66 Stat. 209, 8 U.S.C. sec. 1252(b); section 405(a) of the Immigration and Nationality Act, 66 Stat. 280; portions of section 242.53(b) and section 242.61 of the Administrative Regulations Implementing the Immigration and Nationality Act, 8 C.F.R. 1952 revision.

3. Appendix B also includes other provisions and rules less directly involved to which reference is made.

Questions Presented.

I. Whether an alien was "convicted" within the purview of section 241(a)(4) of the Immigration and Nationality Act, 66 Stat. 204, where he was granted probation and given a year's suspended sentence, after having been found guilty of stealing twelve golf balls by a local Massachusetts court of limited jurisdiction sitting without jury and where, after a satisfactory probation, the sentence was revoked and the case placed on file, *i.e.*, continued generally.

II. Whether the theft of a dozen golf balls is a "crime involving moral turpitude."

III. Whether section 241(a)(4) of the Immigration and Nationality Act should be given a retrospective construction, making it applicable where the "conviction" on which deportation is based occurred prior to the effective date of the Act.

IV. Whether the court below erred when it refused to declare the deportation order void though it was based on proceedings conducted in violation of procedural due process and of the requirements of the Immigration and Nationality Act and the Regulations issued thereunder, but instead went behind the order to determine the petitioner's deportability.

Statement of the Case.

In this case the petitioner challenges the validity of an order of deportation. The petitioner was brought to the United States about forty-six years ago when he was about

a year old. He has lived here continuously since that time and is married to an American citizen (R. pp. A64, A2).

In 1926, when the petitioner was twenty years old, he was convicted in Massachusetts of violating General Laws (Ter. Ed.) c. 265, sec. 23, prohibiting carnal knowledge of a girl under sixteen years of age. In December, 1948, the petitioner was charged with the theft of a dozen golf balls in the Third District Court of Eastern Middlesex. This is a local Massachusetts court of limited jurisdiction sitting without jury. From this court a defendant has a right of appeal to the Superior Court, where he is given a trial *de novo* before a jury (see Opinion of court below, R. pp. 132-134). The petitioner pleaded not guilty, but was found guilty on January 4, 1949. The court subsequently on January 28, 1949, granted him probation, suspending a one year's sentence in the House of Correction to January 30, 1950. On that date it appeared to the court that the probation had been satisfactory and the court therefore revoked the sentence and placed the case on file (R. pp. A58, A102-103; see Opinion of court below, R. pp. 132-134), *i.e.*, continued it generally (R. p. A78).

Based on these two charges, both of which occurred more than five years after the petitioner's entry into the United States, a Special Inquiry Officer of the Immigration and Naturalization Service on March 23, 1953, issued the order of deportation under section 241(a)(4) of the Immigration and Nationality Act.

This order was issued after proceedings begun on or about January 5, 1952, when a warrant was issued for the petitioner's arrest. Relevant parts of these proceedings are more fully described in the argument regarding their validity.

The deportation order of March 23, 1953, was affirmed by the Board of Immigration Appeals on August 11, 1953. The petitioner surrendered on December 18, 1953, pursuant

to notification to report for deportation, and on the same day filed a petition for habeas corpus in the United States District Court for the District of Massachusetts, pursuant to 28 U.S.C. sec. 2241(a). The District Court issued the writ, but after a hearing on the merits discharged the writ and dismissed the petition on February 1, 1954. The petitioner appealed to the Court of Appeals for the First Circuit, which, on August 2, 1954, affirmed the order of the District Court.

Summary of Argument.

I. The record in the golf ball case is not a record of conviction since it indicates that the petitioner was found guilty and given a suspended sentence and probation and that after a satisfactory probation the sentence was revoked and the case placed on file. Under Massachusetts law this is not a final disposition of the case since a defendant may, where his case is on file, require the court to impose sentence, from which sentence he would have a right to appeal and a jury trial *de novo* in the Superior Court. But, apart from finality, a "conviction" must import criminality appropriate for the imposition of collateral disabilities and penalties. This has been the assumption of the Board of Immigration Appeals and the courts in assessing the sufficiency of a state court record as a basis for deportation. They have looked to see if the law of the state in which the record was made imposes disabilities or collateral penalties on the basis of that record. Of course, Congress could have made its own definition of conviction, but, absent any indication that it did so, the state action it utilizes as a basis for deportation must be evaluated by state law.

In Massachusetts the record in the golf ball case cannot be the basis for the imposition of disabilities since it does

not contain a sentence actually served. The fact that the defendant has been on probation reinforces this conclusion since probation in Massachusetts looks to rehabilitation and does not stamp the defendant as a criminal. It requires the consent of a defendant and indeed in the Superior Court may be imposed even before a finding of guilt.

Moreover, even if some general definition of "conviction" is contemplated by Congress, it must be found (unless there is strong indication to the contrary) in the background of federal decisions against which Congress was legislating. But since 1833 the federal courts have held that a conviction must include a sentence where it is made the basis for imposition of collateral penalties. Moreover, probation under the federal law is not punishment; and an interpretation of the Immigration and Nationality Act in harmony with the purposes of the Probation Act thus requires that a record of the type here involved—where a court has decided that a defendant does not require punishment but merits an opportunity for rehabilitation—should not be treated as a basis for imposing the penalty of deportation.

The Immigration and Nationality Act itself contemplates a sentence (sec. 241(b), 8 U.S.C. sec. 1251(b)) and imprisonment (sec. 242(h), 8 U.S.C. sec. 1252(h)). The contrast between section 212(a)(9), 8 U.S.C. sec. 1182(a)(9), which excludes an alien who not only has been convicted of but admits having committed a crime involving moral turpitude, and section 241(a)(4), 8 U.S.C. sec. 1251(a)(4), which does not permit deportation on the basis of an admission, indicates that Congress intended in section 241(a)(4) a pronouncement by a court that an alien's criminal act deserves punishment.

The only indication in section 241(a)(4) that a "conviction" includes something less than a sentence is the phrase "regardless of whether confined therefor." But nowhere in the legislative history is there any mention that so drastic

a change from the requirement of one year's sentence was contemplated. On the contrary, the legislative history indicates that this phrase was inserted to obviate the decision in *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, and to provide that deportation can follow two convictions regardless of whether the alien was confined for each offense separately. Thus that phrase makes sufficient for deportation concurrent sentences or a single sentence on two counts where the two counts do not arise out of a single scheme of criminal misconduct. Actual confinement still is necessary.

II. The theft of a dozen golf balls is not a "crime involving moral turpitude." In Massachusetts theft of property valued at not more than $100 is a misdemeanor punished by imprisonment in jail for not more than one year or by a fine of not more than $300—a penalty far less severe than the punishment for larceny over $100, which is a felony. Contrary to the expressions in Blackstone that larceny is *malum in se* and a felony, it seems clear that the English law, both common law and statutory, did not regard all theft in the same light. What and how much was stolen was always material to the type of trial and the type of punishment. Although the American courts (uncritically following Blackstone) regarded petty larceny as a felony in applying technical common law rules such as those regarding the disqualification of witnesses, 17th, 18th and 19th Century America regarded small theft as a petty offense, classing pilferers with "common pipers" and "peddlers and hawkers," trying them before justices of the peace without jury and with jurisdiction to mete out small fines or light jail sentences. The distinction between grand and petty larceny has persisted not only in Massachusetts statutes but in Congressional legislation.

The cases which have actually permitted deportation on the basis of petty larceny are very few. The Board of Immigration Appeals, though calling petty larceny a "minor

infraction," has held that it involves moral turpitude on the theory, apparently, that the intent is somehow the same in all larceny. But the intent is to do the act, and the act here is pilfering a dozen golf balls. From the statute and the record, which is all that the court can look at, this would seem to be a most venial crime.

Petty larceny does not fit into the category of felonies involving fraud which *Jordan* v. *De George*, 341 U.S. 223, marked out to save the phrase "moral turpitude" from being void for vagueness. But no other category consistent with Congressional intent but still sufficiently definite will include petty larceny. The Government in its brief in *Jordan* v. *De George* suggested that "crimes involving moral turpitude" means infamous crimes or serious penal offenses. These as well as the felony-misdemeanor distinction have a basis in legislative history, but none of these categories include petty larceny.

Decisive, it would seem, is the treatment of petty larceny in the 1948 revision of the Criminal Code, where larceny not in excess of $100 is included by the revisors among those crimes which they state do not involve moral turpitude.

To interpret petty larceny as sufficient for the imposition of the drastic penalty of deportation raises serious questions whether the Immigration and Nationality Act does not—in view of *Weems* v. *United States*, 217 U.S. 349—violate the prohibition in the Eighth Amendment against cruel and unusual punishment or the due process clause of the Fifth Amendment to the extent that it incorporates the principles of the Eighth Amendment.

III. "Is convicted" in section 241(a)(4) is a specific prospective designation making that subsection inapplicable to crimes and convictions that occurred before the effective date of the Act. Subsection 241(a)(4) is one of eighteen subsections in section 241(a). That section 241(a) contains a multitude of subtle tense distinctions, many of which are

obviously appropriate to effect retrospectivity. Moreover, *Kessler* v. *Strecker*, 307 U.S. 22, had alerted Congress to the consequences of using the present tense, and *Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, had instructed Congress just how to accomplish retrospectivity. In the light of these cases and the marked contrast between other subsections and subsection 241(a)(4), this subsection specifically provides for prospective application so that section 241(d) is inapplicable. Section 241(d) was designed to cope with ambiguities in the complexities of section 241(a), but subsection 241(a)(4) is not ambiguous. The legislative history bears out that Congress did not intend retrospectivity except in subsection 241(a)(2) and in those provisions which merely continued existing law—a proposition which the Government rejects as to section 241(a)(4).

A prospective interpretation of section 241(a)(4) is moreover in harmony with section 405(a), according to which the petitioner might be liable to deportation under section 19(a) of the Immigration Act of 1917 if he is sentenced in the future to imprisonment for a year or more for a crime involving moral turpitude.

IV. The deportation order was based on proceedings in which the Special Inquiry Officer acted as an investigating official contrary to section 242(b) of the Act and section 242.53(b) of the Regulations (8 C.F.R.), which provides that the Special Inquiry Officer "shall conduct a fair and impartial hearing." He introduced irrelevant evidence, termed by the United States District Court of a "highly incendiary character" (R. p. A113), contrary to section 242.53(b), which also provides that the Special Inquiry Officer "shall exclude from the record any evidence that is irrelevant, immaterial, or unduly repetitious." Thus the petitioner was deprived of a fair and unbiased appraisal of the questions of law involved. Moreover, apart from the minimum procedural due process provided by the Fifth

Amendment, the deportation order, based as it is on violations of the Act and Regulations, is invalid, and the detention of the petitioner under that order is illegal. The legislative history of the Act indicates that Congress contemplated that the courts would not go behind a deportation order to see if the defendant was actually deportable, but would enforce the procedural requirements of the Act and Regulations.

Argument.

I. The petitioner was not "convicted" of the theft of twelve golf balls within the meaning of section 241(a)(4) of the Immigration and Nationality Act.

Whether there has been a conviction depends on the effect of the proceedings in the Third District Court of Eastern Middlesex as embodied in the record of that court (R. pp. 57-58). But that paper has meaning only with reference to the law of Massachusetts. It is to Massachusetts law, therefore, that we must look to see—

First, whether the record imports finality. The court below rejected the Government's contention and the contention of the Board of Immigration Appeals that finality was not necessary and that a mere finding of guilt makes an alien deportable even while the finding is being appealed. The court below correctly looked to Massachusetts law to assess the finality of the finding of guilty, although we contend its conclusion was erroneous.

Second, whether the record imports criminality appropriate for the imposition of collateral penalties and disabilities. Here too the Board of Immigration Appeals and the courts, in deciding whether there was a record of conviction in a given case, have looked to state law to see whether the state imposed disabilities on the basis of that record.

Thus the Board of Immigration Appeals has held that a finding of guilt in California when it was followed by probation and even a jail sentence was not a conviction within the meaning of section 3 of the Immigration Act of February 5, 1917 (as applied in section 19(a) of that Act, providing for the deportation of aliens "convicted" prior to entry), because most disabilities under California law were wiped out after a satisfactory probation. *In the Matter of O— T—*, 4 I. & N. Dec. 265. Cf. *In the Matter of F—*, 1 I. & N. Dec. 343. In *Wilson* v. *Carr*, 41 F. (2d) 704 (C.C.A. 9th), the court looked to the same California law and held that an alien was not deportable while on probation although he had been found guilty and served part of a year's term ancillary to the probation. There too, after a satisfactory probation, the alien would be relieved from penalties and disabilities. In *United States ex rel. Cerami* v. *Uhl*, 78 F. (2d) 698 (C.C.A. 2d), the court analyzed the New York law in determining that an order of confinement to the New York House of Refuge was not a "sentence" within the Immigration Act of February 5, 1917. Cf. *Perkins* v. *United States ex rel. Malesevic*, 99 F. (2d) 255 (C.C.A. 3d).

The Board of Immigration Appeals in this very case (R. p. A77), following *United States ex rel. Freislinger on Behalf of Kappel* v. *Smith*, 41 F. (2d) 707 (C.C.A. 7th), looked to the law of Massachusetts for the meaning of the word "conviction." Reference to state law also follows from *United States* v. *Di Re*, 332 U.S. 581, in which this court held that the validity of an arrest in New York was determined by the law of New York.

A. The record in the golf ball case does not import finality.

The record in this case indicates that after a finding that the defendant was guilty of the theft of a dozen golf balls

the District Court suspended a one year's sentence in the House of Correction, placing the petitioner on probation under Massachusetts General Laws (Ter. Ed.) c. 279, sec. 1. In accepting the probation the defendant's right of appeal to the Superior Court from that sentence was waived since "The appeal must be taken forthwith or is assumed to have been waived." *Sylvester* v. *Commonwealth*, 253 Mass. 244. This was a "temporary, not a final disposition of the case," *King* v. *Commonwealth*, 246 Mass. 57, at 60; the sentence could be modified at any time during the term of the probation. But while the defendant was within the probation system he could not appeal. This followed from the nature and purpose of the probation system as explained in *Mariano* v. *Judge of District Court of Central Berkshire*, 243 Mass. 90, at 92-93. The court said of the probation system:

> "This plan would be frustrated if there remained the right at any time to upset the working of these influences by breaking the terms of the probation and appealing to the Superior Court. All the time and effort expended in his behalf would be wasted. The elaborate and expensive probation system in connection with the suspended sentence for district courts hardly would have been established provided there still remained the right in the person convicted, if discontented with the measures taken for his benefit and reformation, to remove his case from the jurisdiction of the district court to that of the Superior Court."

At the end of the petitioner's probation it appeared that the probation had been satisfactory and the court therefore revoked the sentence. It did not, however, dismiss the case, but placed it on file, thus continuing it generally outside the probation system by virtue of its common law

powers. The effect of placing a case on file is described in *Commonwealth* v. *Dowdican's Bail*, 115 Mass. 133, at 136:

> "It has long been a common practice in this Commonwealth, after verdict of guilty in a criminal case, when the court is satisfied that, by reason of extenuating circumstances, or of the pendency of a question of law in a like case before a higher court, or other sufficient cause, public justice does not require an immediate sentence, to order, with the consent of the defendant and of the attorney for the Commonwealth, and upon such terms as the court in its discretion may impose, that the indictment be laid on file; and this practice has been recognized by statute. Sts. 1865, *c.* 223; 1869, *c.* 415, § 60. Such an order is not equivalent to a final judgment, or to a *nolle prosequi* or discontinuance, by which the case is put out of court; but is a mere suspending of active proceedings in the case, which dispenses with the necessity of entering formal continuances upon the dockets, and leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward and pass any lawful order or judgment therein."

The Board of Immigration Appeals adds (R. p. A78):

> "There has been merely a suspension of active proceedings in the case, and as yet no final disposition (*Commonwealth v. Carver*, 224 Mass. 42)."

Thus we have here a continuance, and, like any other continuance, it does not bar further proceedings in the case; at any time, on motion of the defendant (the petitioner here) or on motion of the prosecutor or the court, further proceedings may be had from which the defendant

may (if sentenced) appeal to the Superior Court, thus vacating the finding and sentence.

This is also set out in the letter of June 4, 1953, by the Assistant Clerk* of the Third District Court of Eastern Middlesex (R. p. A74; see also A81), supplementing his letter of January 9, 1953 (R. p. A35), and made a part of the record in these proceedings. He writes:

> "It appears that since the original sentence is revoked, if a new sentence be imposed the defendant would thereupon have the right to appeal to the Superior Court from the new sentence if so imposed. If the original plea entered by the defendant in a case was 'not guilty' upon an appeal the matter is thereupon certified to the Superior Court for trial de novo."

That a defendant has a right to have sentence pronounced and a right of appeal in this situation was decided in *Marks* v. *Wentworth,* 199 Mass. 44, where, as in this case, the defendant had been placed on probation with his consent. Later the case was placed on file. The court refused to sentence the defendant and he brought mandamus to compel the court to sentence him, so he could appeal. The court issued the mandamus. There was apparently some question as to whether the order placing the case on file was valid, since it was entered without the defendant's consent. The court said this was immaterial, since, "if the order be given any effect, it leaves the case still in court, subject to be disposed of hereafter."

The Fifth Report of the Judicial Council of Massachusetts, Public Document No. 144 (reprinted in 15 Mass. Law Quarterly (2), December, 1929), p. 29 *et seq.,* contains a detailed discussion of the procedure here involved and

*A subpoena for the Assistant Clerk had been refused by the Special Inquiry Officer (R. p. A30).

concludes that it is not a "final conviction." (See Appendix A.)

The Board of Immigration Appeals has substantially accepted this analysis and bases the order of deportation on the finding of guilt itself regardless of its finality.* The United States District Court followed the Board of Immigration Appeals in holding that a mere finding of guilt is a sufficient conviction, though it questioned the power of the Third District Court of Eastern Middlesex to place the case on file. The court based its doubt on *Commonwealth* v. *Maloney,* 145 Mass. 205, cited to it by the respondent. But that case merely held that a trial justice (similar to a justice of the peace) had no power to place a case on file.† It expressly confirms this power in the District Courts and its explanation of the practice at pages 210-211 of the opinion has been cited in subsequent cases, *e.g., Marks* v. *Wentworth,* 199 Mass. 44.

The Court of Appeals, as set out above, rejected the respondent's contention that a mere finding of guilt was sufficient to make an alien deportable even while an appeal was pending. It held, however, that the record here indicated sufficient finality because the petitioner had, through delay, lost his right to have a sentence imposed from which he could appeal. This delay, the court states, would bar the writ of mandamus issued in *Marks* v. *Wentworth.* But

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*In its opinion (R. p. A81) it expresses some doubt as to whether an appeal will lie if the defendant (petitioner here) is sentenced, citing *Renado* v. *Lummus,* 205 Mass. 155. But that case turned on the right of appeal from a sentence which had been imposed and suspended under the probation system. Appeal from such a sentence a week later came too late. The record in our case indicates that there is no outstanding suspended sentence and that the defendant has been removed from the probation system. There is merely a continuance (*Marks* v. *Wentworth, supra.*)

†Since changed by statute, Massachusetts General Laws, c. 219, sec. 8 (1917).

delay, standing alone, is not sufficient to sustain a defense of laches. *Peckham* v. *Mayor of Fall River*, 253 Mass. 590. *Shea* v. *Shea*, 296 Mass. 143, at 149.

The respondent, in its brief in opposition (pp. 9-10), recognizes the right of the petitioner to have sentence imposed, but argues that it is incumbent upon him to make the request. It is submitted that the petitioner need not take the risk of a trial in the Superior Court when its result may mean possible deportation.

B. The record in this case, since it does not include a sentence actually imposed, does not import criminality effective to impose collateral disabilities or penalties on a defendant.

This is well settled in Massachusetts. *Commonwealth* v. *Kiley*, 150 Mass. 325. *Commonwealth* v. *Hersey*, 324 Mass. 196, at 205. *Attorney General* v. *Pelletier*, 240 Mass. 264, at 310-311. *People* v. *Schaller*, 229 N.Y.S. 492. Fifth Report of the Judicial Council of Massachusetts, Public Document No. 144 (reprinted in 15 Mass. Law Quarterly (2), December, 1929), p. 29 *et seq.* (Appendix A.) See also *Renado* v. *Lummus*, 205 Mass. 155; *Mariano* v. *Judge of District Court of Central Berkshire*, 243 Mass. 90, at 92.

In *Commonwealth* v. *Kiley* the defendant was prosecuted for selling liquor without a license. He had been previously found guilty of violating the conditions of his license. He had appealed, his exceptions had been overruled and a rescript had been handed down but no sentence had as yet been imposed. The statute under which he had been previously found guilty provided that the license became void on "conviction," and the Commonwealth argued (as the Government did here) that the finding of guilt without more was such a conviction as to void the license. The

court held that the finding of guilt was not a conviction under that statute because "the effect of a conviction of the kind named is to deprive the defendant of a valuable right."

Commonwealth v. *Hersey* involves the use of a record of conviction to impeach the credibility of a witness under General Laws, c. 233, sec. 21. The court said:

> "It is settled that under this section, permitting the introduction of a record of conviction of a crime, the term 'conviction' means a final judgment and sentence of the court conclusively establishing his guilt. Merely showing a verdict of guilty or placing a defendant on probation does not satisfy the statute. . . . [Citing, among other cases, *Commonwealth* v. *Kiley*, also cited in *Attorney General* v. *Pelletier*.]"

Even the specific statutory change in clause 2 of chapter 233, sec. 21, making records of felonies admissible to impeach credibility where sentence has not been imposed, was held not to change the requirement of final sentence and judgment with reference to misdemeanors in clause 1, where the word "conviction" still remains unqualified. *Forcier* v. *Hopkins*, 329 Mass. 668.

In *People* v. *Schaller* the Appellate Division in New York held that, where a defendant had pleaded guilty in Massachusetts and his case had been placed on file, there was no conviction within the meaning of a New York statute providing life imprisonment for a person who had been convicted four times.

The United States District Court, the Board of Immigration Appeals and the Special Inquiry Officer rely on *Commonwealth* v. *Lockwood*, 109 Mass. 323, and *Munkley* v. *Hoyt*, 179 Mass. 108. The *Lockwood* case involved only the question whether the Governor could issue a valid pardon to a

defendant found guilty while his appeal was pending. The court itself distinguished the situation where collateral disabilities were involved, saying, at page 329:

> "When indeed the word 'conviction' is used to describe the effect of the guilt of the accused as judicially proved in one case, when pleaded or given in evidence in another, it is sometimes used in a more comprehensive sense, including the judgment of the court upon the verdict or confession of guilt; . . . And it might be held to have the same meaning in the somewhat analogous case in which the Constitution provides that 'no person shall ever be admitted to hold a seat in the legislature or any office of trust or importance under the government of this Commonwealth, who shall in the due course of law have been convicted of bribery or corruption in obtaining an election or appointment.' Const. Mass. *c.* 6, art. 2. See *Case of Falmouth,* Mass. Election Cases (ed. 1853) 203."

This distinction between *Commonwealth* v. *Lockwood* and *Commonwealth* v. *Kiley* is also made in *People* v. *Fabian,* 192 N.Y. 443, at 450.

Munkley v. *Hoyt,* on which the United States District Court, the Board and the Special Inquiry Officer place primary reliance, involved a statute authorizing the Board of Pharmacy to suspend or revoke the registration of a pharmacist pursuant to a statute providing that "the license or certificate of registration of a registered pharmacist shall not be suspended or revoked for a cause punishable by law until after conviction by a court of competent jurisdiction." The licensee had been found guilty of unlawfully selling liquor and his case placed on file. On certiorari attacking the Board's revocation of the license, the court held that "conviction" in that statute did not re-

quire a final judgment, precisely because no disabilities flowed from it. The "conviction" was not the basis for the revocation of the license but merely a condition precedent to the initiation of an investigation by the Board (R. p. A30). The Board was bound to make its determination totally independent of the court record.

Munkley v. *Hoyt* itself recognizes at page 110 that, where a record is conclusive in proceedings "to deprive the defendant of a valuable right," *Commonwealth* v. *Kiley* applies, and the record must contain a final judgment.

C. The fact that the petitioner was placed on probation and the probation was satisfactory is itself inconsistent with the imposition of disabilities.

Probation in Massachusetts, where the concept originated, is contrary to the notion of punishment. As set out in 2 Attorney General's Survey of Release Procedures, p. 1:

> "Probation is the postponement of final judgment or sentence in a criminal case, giving the offender an opportunity to improve his conduct and to readjust himself to the community, often on conditions imposed by the court and under the guidance and supervision of an officer of the court. According to the Massachusetts court, 'probation looks to reformation and not to a final goal of punishment.' [Citing *Marks* v. *Wentworth.*]"

See also Chute, The Development of Probation in the United States (Glueck, Probation and Criminal Justice, pp. 228-229), *Mariano* v. *Judge of District Court of Central Berkshire, supra,* and Massachusetts General Laws, c. 276,

sec. 87, which permits the Superior Court to place a defendant on probation even before a finding of guilt.

In the Sixth Annual Report of the Massachusetts Commission on Probation, 1914 (p. 17), Public Document No. 85, cited in Grinnell, Probation as an Orthodox Common Law Practice in Massachusetts Prior to the Statutory System, 2 Mass. Law Quarterly (6), 591 at 594, it is stated:

> "The probation service deals with human material that has not been stamped as criminal. It undertakes to build out of this a respect for law and correct personal conduct before the difficulty of that task has been heightened by penal experience."

We thus have here a record indicating that the court has refused to stamp the petitioner as criminal, but rather revoked the sentence on the basis of a satisfactory probation. It is submitted that this is not the type of court action which entails the imposition of so serious a penalty as deportation.

D. Reference to a general federal law as to the meaning of "conviction" yields the same result as an examination of Massachusetts law.

The federal courts have also required a sentence actually imposed where the "conviction" is used collaterally to impose a further penalty on a defendant. Thus in cases providing a greater penalty for a second or subsequent offense the federal courts have held that the first "conviction" must include a sentence. *United States* v. *Thompson*, Fed. Cas. No. 16,485, 4 Cranch C.C. 335 (1833). *Schooley* v. *United States*, 4 F. (2d) 767 (C.C.A. 8th). *Singer* v. *United States*, 278 F. 415 (C.C.A. 3d). *United States* v.

Stoddart, 11 F. (2d) 827 (D.C. E.D. Pa.). (*Cf.* Rule 32(b) of the Rules of Criminal Procedure.)

Even in a naturalization proceeding where the issue is merely the petitioner's good moral character, the court has held that, where the Government chooses to rely on a record of conviction to show bad moral character, the record must contain a final judgment. *In re Ringnalda*, 48 F. Supp. 975 (D.C. S.D. Calif.). Cf. *Wilson* v. *Carr*, 41 F. (2d) 704 (C.C.A. 9th).

The court below attributes to a probation order and a general continuance the serious consequence of a sentence. But neither a general continuance (*Miller* v. *Aderhold*, 288 U.S. 206, 208) nor probation is the final judgment which includes a sentence (*Berman* v. *United States*, 302 U.S. 211). Probation does not connote a sentence and the punishment inherent in a sentence. "Probation is concerned with rehabilitation," *Berman* v. *United States, supra, Korematsu* v. *United States*, 319 U.S. 432, at 435, *Roberts* v. *United States*, 320 U.S. 264, 272, and the dissenting opinion which (reaching the constitutional question that the majority did not have to consider) held that the imposition of a sentence after a period of probation did not "offend the safeguard of the Fifth Amendment against double punishment" (p. 276).

In *United States ex rel. Cerami* v. *Uhl*, 78 F. (2d) 698 (C.C.A. 2d), *supra*, the court went even further and held that confinement in the House of Refuge was not a "sentence." The Immigration Service itself in previous proceedings against this petitioner said (R. p. A63) that in this very case there was not a sentence within prior immigration laws, citing *United States ex rel. Robinson* v. *Day*, 51 F. (2d) 1022 (C.C.A. 2d).

Indeed, it seems inconsistent with the purposes of the Probation Act to make an alien deportable on the basis of proceedings in which a court has decided that he merits the opportunity for rehabilitation and does not require

punishment.* Nor is *Korematsu* v. *United States* to the contrary. It merely holds that a probation order is a final decision for appeal purposes. Cf. *Stack* v. *Boyle*, concurring opinion, 342 U.S. 1, at 12.

Authority generally on the consequences of probation in the imposition of collateral disabilities is scarce. The Attorney General's Survey of Release Procedures (vol. 2, p. 345) indicates that sentence is necessary for the imposition of collateral disabilities. The cases collected in 36 A.L.R. (2d) 1238, hold that a suspended sentence and probation do not result in disenfranchisement in those states where that is a consequence of conviction. *Cf.* cases collected in *Smith* v. *Commonwealth*, 134 Va. 589 (annotated in 24 A.L.R. 1290), holding that one cannot be removed from public office after verdict of guilty but before judgment.

Historically, moreover, disabilities flowed from the attaint—the final sentence—rather than the verdict, which Blackstone, in describing the various steps in a proceeding, terms the "conviction." 4 Blackstone, 362. But this distinction had apparently been blurred even in Blackstone's time (4 Blackstone, 381), and various statutes imposing disabilities use the word "conviction" alone. The word has therefore been interpreted to include the judgment or sentence from which the disabilities flowed historically. See also the common-law authorities cited in *United States* v. *Thompson*.

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*Probation in Massachusetts as set out above resembles a sentence even less than under federal law. It requires consent of the defendant (*Mariano* v. *Judge of District Court of Central Berkshire*, 243 Mass. 90) and can be granted by a Superior Court even before a finding of guilt. G.L. (Ter. Ed.) c. 276, sec. 87. Cf. *King* v. *Commonwealth*, 246 Mass. 57, at 60, in which the court said: "The time during which the defendant was on probation was in no sense a part of the term of his sentence."

E. The Immigration and Nationality Act itself indicates that a sentence is required for a conviction.

The word "convicted" in section 241(a)(4) must be construed in the light of section 241(b) (8 U.S.C. sec. 1251(b)), which provides:

> "The provisions of subsections (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply . . . if the court *sentencing* such alien for such crime shall make, at the time of first *imposing judgment or passing sentence,* or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, . . ." (Emphasis supplied.)

It is obviously contemplated that the "alien convicted of a crime" must be sentenced "for such crime."

This is exactly the interpretative technique used in *United States ex rel. Cassetta* v. *Commissioner of Immigration,* 56 F. (2d) 826 (C.C.A. 2d). In that case the court interpreted the word "convicted" in the Narcotic Drugs Import and Export Act, May 26, 1922, c. 202, 42 Stat. 596, to include actual imprisonment because the section provided for the deportation of an alien upon "termination of the imprisonment imposed by the court upon such conviction." The court in that case held that a five-year suspended sentence was not a conviction sufficient for deportation.

Thus, too, Congress in passing section 20(b)(3), (4) and (5) of the Alien Registration Act of 1940, 54 Stat. 671-673 (incorporated in section 19(b) of the Immigration Act of 1917), making deportable aliens who "shall have been convicted" of various crimes, intended that that phrase should include actual imprisonment since it went on to provide that no alien deportable under those provisions "shall be deported until the termination of his imprisonment or the

entry of an order releasing him on probation or parole."* This clause is now incorporated in section 242(h) of the Immigration and Nationality Act.

Moreover, that Congress intended something more than a mere determination of guilt as a basis for deportation is apparent from a comparison between section 212(a)(9) and section 241(a)(4). Section 212(a)(9) excludes aliens on the basis of an admission of guilt. But for deportation Congress required a "conviction"—a solemn pronouncement by a court that the alien had committed a criminal act requiring punishment.

F. Legislative History.

Prior to this Act it was accepted that a sentence actually served was required for deportation. A suspended sentence was not sufficient. *United States ex rel. Robinson* v. *Day*, 51 F. (2d) 1022 (C.C.A. 2d) (R. p. A63). Nowhere, so far as we could find, is there the slightest intimation in the legislative history that the changes made in section 241(a)(4) were intended for the first time to subject an alien to deportation on the basis of a suspended sentence or a mere finding of guilt with or without probation. Certainly so drastic a change would have been mentioned.

Nor is the phrase "regardless of whether confined therefor" intended to accomplish this result. The most obvious answer is that this phrase was intended to make a sentence carrying a fine a basis for deportation. But the legislative history indicates that the phrase was used to solve an entirely different problem. In Senate Report No. 1515,

*The reference to release on probation as well as parole, is required to cover such states as Ohio, where "probation" may be granted even after sentence has begun (1 United States Attorney Release Procedures, p. 888), and Louisiana, where probation and parole are confused in the statutes (1 United States Attorney Release Procedures, p. 439).

81st Congress, 2d Session, at p. 391, it appears that the Committee on the Judiciary was concerned with modifying the former requirement that the alien be "sentenced more than once," which was interpreted in *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, to mean sentences on two different occations. See Note, "Developments in the Law—Immigration and Nationality," 66 Harvard Law Review, 643, at 685.

Accordingly, it provided for two convictions "regardless of whether confined therefor"—that is, regardless of whether confined for each offense separately. Thus concurrent sentences or a single sentence on two counts where the two counts do not arise out of a single scheme of criminal misconduct (*cf.* Rule 8(a), Rules of Criminal Procedure) are now sufficient for deportation.

House Report No. 1365, 82d Congress, 2d Session, U.S. Code Congressional and Administrative News, 1952, p. 1653, at 1715, indicates that the phrase "regardless of whether confined therefor," instead of "sentenced more than once," was used to accomplish just this. It lists as deportable:

> "Aliens who, within five years of entry, are convicted of a crime involving moral turpitude and sentenced to confinement for a year or more; or who, at any time after entry, are convicted of two such crimes, whether or not confined. Thus, an alien who at any time after entry is convicted of two crimes involving moral turpitude is deportable, *regardless of whether confined therefor,* whereas under existing law the alien must have been sentenced *more than once* to a term of a year or more because of such convictions." (Emphasis ours.)

Thus, too, in the first part of section 241(a)(4), where Congress inserted after "sentenced" the words "or con-

fined," Congress did not intend to change the meaning of "sentenced" as there used (*United States ex rel. Robinson* v. *Day, supra*). It appears that this insertion was made to make clear that indeterminate sentences were sufficient for deportation. Here too it seems clear that actual confinement is contemplated. Thus Senate Report No. 1515, p. 391, states:

> "deportation should be required in the case of a single conviction only if the conviction occurred within five years after entry and resulted in confinement in a prison or corrective institution for a year or more."

On the basis of this analysis a sentence to confinement is necessary in both parts of section 241(a)(4), and this is asserted by Mr. Walter Besterman,* legislative assistant of the House Committee on the Judiciary, in a commentary on the Act printed with Title 8 of the United States Code Annotated (p. 61). He states:

> "Further, falling into the class of deportable aliens are the socially undesirables, . . . aliens convicted of crimes involving moral turpitude and sentenced to confinement . . ."

It may also be significant that Senate Report No. 1515, at page 71, states that the old immigration law imposes deportation for "conviction of a crime." The Judiciary Committee is obviously here using the word "conviction" to include a sentence actually served.

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*See comment by Congressman Graham, 98 Congressional Record, p. 4307: "First I want to add my word of appreciation for the work of our administrative assistant, Mr. Walter Besterman and his legislative clerk Mrs. Ruth Benn. I know of no two persons who have labored more than they have on the infinite details of this tremendous bill."

The interpretation by the court below, particularly when coupled with a retrospective interpretation of the section, will, we daresay, resurrect numberless cases long forgotten in which aliens had been granted probation and then probation had been terminated, as in the federal courts, or in which the proceedings after a satisfactory probation were continued indefinitely, as in our case. As in our case, probation was accepted, and no appeals were taken because the stakes were not high, and because in many states an appeal does not lie from a probation order. (Even in the federal courts there was great doubt on this question before *Korematsu* v. *United States.*) As in our case no attempts were made to get recommendations against deportation as provided by section 19(a) of the Act of 1917, predecessor to section 241(d) of this Act, since the proceedings could not be made grounds for deportation.

The interpretation sought by the Government is unnecessarily harsh, and it is submitted that this court should avoid such a result in deciding this question, which the Board of Immigration Appeals has characterized as "not free from difficulty" (R. p. A78). *Barber* v. *Gonzales,* 347 U.S. 637. *Fong Haw Tan* v. *Phelan,* 336 U.S. 6.

II.

THE THEFT OF A DOZEN GOLF BALLS IS NOT A "CRIME INVOLVING MORAL TURPITUDE."

Theft of property valued at no more than $100 is a misdemeanor in Massachusetts, punishable by imprisonment in jail for not more than one year or by a fine of not more than $300. Theft of property valued at more than $100 is a felony punishable by imprisonment in the state prison for not more than five years or by a fine of not more than $600 and imprisonment in jail for not more than two years. Massachusetts General Laws, c. 266, sec. 30; c. 274, sec. 1.

Difference in treatment between petty larceny and grand larceny goes back to the very beginnings of the common law. 2 Pollock & Maitland, History of English Law (2d ed.) pp. 495-498. The distinction occurs as early as 1275, in the Statute of Westminster I, c. 15. The differences which developed in the English law by the end of the 18th Century have led Professor Jerome Hall to conclude that petty larceny was not (contrary to the uncritical assumptions made in the American cases) even a felony. Hall, Theft, Law and Society (1st ed.) p. 298 *et seq. Cf.* 3 Holdsworth, History of English Law (3d ed.) pp. 366-367. That all stealing was not regarded alike in England is also indicated in such Special Acts as 10 George III, c. 18 (1770), which provided a penalty of 20 to 30 pounds for stealing dogs, or, in default, six to twelve months in the common jail, the trial to be before any two justices of the peace. See also 18 George II, c. 27 (1745).

In Massachusetts the difference between petty larceny and grand larceny is marked from the earliest colonial days. The General Laws of the Massachusetts Colony Revised and Published in 1660 (Burglary and Theft), p. 7, sec. 3 (Colonial Laws of Massachusetts, Boston, 1889, p. 127), contains an Act, apparently passed in 1652, which provides:

> "That what person shall steal from any person any coin, goods or chattels to the value of 10 shillings or upwards shall be whipped or pay such a sum or sums of money as the court or magistrate that hath proper cognizance thereof shall adjudge to be sufficient to satisfy all costs and charges of the court and country . . . to the use of the common treasury, and for smaller thefts it is left to the discretion of the judge or judges that shall have cognizance of the crime to appoint smaller mulcts or punishments or only legal admonition as they shall find cause."

A further clue to the colonial attitude towards small theft is found on page 67 of the 1660 Revision (Colonial Laws, Boston, 1889, p. 187), where "pilferers" are classed with "idle persons or stubborn persons" and "run-aways [and] common drunkards" among those who could be summarily committed by a magistrate to a House of Correction. Such institutions were "in purpose correctional institutions in a true sense of those words." *United States* v. *Moreland*, 258 U.S. 433, at 447. This statute was broadened in 1699, c. 8, sec. 2, Province Laws, 1690-1700 (I Acts and Resolves of the Province of Massachusetts Bay, 1692-1714, Boston, 1869, p. 378), to include along with "pilferers" a number of other petty types, such as "common pipers, fiddlers," etc.*

The Province Laws of Massachusetts (1692-1693) c. 18, sec. 3 (I Acts and Resolves of the Province of Massachusetts Bay, 1692-1714, p. 52), provided that theft be punished by forfeiture of three times the amount stolen and by fine not exceeding 5 pounds and whipping not exceeding 20 stripes. Justices of the peace were given jurisdiction where the "damage" did not exceed 40 shillings; and this in practical effect marked the distinction between grand and petty larceny. Chief Justice Shaw in *Jones* v. *Robbins*, 8 Gray, 329, at 347, in discussing the definition of infamous crimes, states:

> ". . . petty larceny or pilfering, associated as it is with vagrancy and other small and not well defined offences, has always been punishable by a magistrate or justice of the peace, both under the colonial and pro-

*This statute subsequently became chapter 272, sec. 53, of the General Laws of Massachusetts (1932 ed.), and continued to include "pilferers" until that category was eliminated by the Acts of 1943, c. 377. By that time the statute had "come to have a flavor of obsolescence." *Commonwealth* v. *Lombard*, 321 Mass. 294, 295.

vincial governments, from the earliest settlement of the country. Indeed, offences not above the degree of petit larceny are put, by Chancellor Kent, by way of example, as offences not infamous, and therefore not within the constitutional restriction."

In 1784, after the adoption of the Massachusetts Constitution, the jurisdiction of the justice of the peace was marked out more clearly to extend to cases of larceny where treble the value of the property stolen did not exceed 40 shillings. He was given authority to impose a fine not exceeding 40 shillings or imprisonment for not more than twenty days. Statute of 1784, c. 66, sec. 4. *Commonwealth* v. *Harris*, 8 Gray, 470, at 475.

In 1804 (Acts of 1804, c. 143, sec. 1) larceny of property not in excess of $100 was punishable by solitary imprisonment for a term not exceeding six months and by confinement afterwards to hard labor for a term not over one year, or by a fine not over $100 and imprisonment in the common jail for a term not exceeding one year. Larceny of property valued in excess of $100 was punished more severely. A further significant differentiation provided in section 2 of the same Act was in the jurisdiction of the courts. The Supreme Judicial Court was given jurisdiction over larceny exceeding $100. The Court of Common Pleas and the Boston Municipal Court (both sitting with jury) were given jurisdiction, concurrent with the Supreme Judicial Court, of larceny of property not in excess of $100. These intermediate courts were, however, not authorized to impose solitary imprisonment or hard labor. They could only impose a fine of not over $100 or imprisonment in the common jail of not over one year. Justices of the peace were given jurisdiction, concurrent with the other courts, of thefts not exceeding $5. A justice of the peace could impose a fine up

to a maximum of $5 and a maximum of twenty days in jail. Taking into account the far greater value of the dollar in 1804 it would seem that petty theft was generally handled by the justice of the peace. Chief Justice Shaw in *Jones* v. *Robbins*, 8 Gray 329, at 334, made this point in discussing the Revised Statutes of 1836, c. 126, sec. 18,* which gave the justice of the peace and the police court of Boston, also a summary court sitting without jury, jurisdiction where the value of the property stolen exceeded $15. They could impose a fine of not more than $15 or more than six months in the county jail. Chief Justice Shaw stated:

> ". . . jurisdiction was intended, according to a long course of practice, to be given to a justice of the peace or police court, in cases of petty offences and small pilfering, though amounting in law to larceny, and, of course, felony at common law—in case of simple larceny to the amount of $15, and in an aggravated larceny not exceeding $5; and that these should be deemed petty, and be punishable by a justice of the peace; . . ."

In that case he held unconstitutional a statute passed two years previously (Acts of 1855, c. 448, sec. 1), which he construed to permit police courts proceeding on complaint rather than indictment to impose a sentence in the state prison for larceny. He held that imprisonment in the state prison was an infamous punishment and could be punished only upon indictment. A new statute was immediately

*By section 17, chapter 126 of the Revised Statutes of 1836, larceny of property valued not in excess of $100 had been made punishable by no more than one year's imprisonment in the state prison or county jail or a fine of not more than $300. Larceny of property valued in excess of $100 had been made punishable by no more than five years' imprisonment in the state prison or by fine not exceeding $600 and imprisonment in the county jail for not more than two years.

passed (Acts of 1857, c. 157) giving police courts power to punish larcenies of property not exceeding $50 in value by imprisonment for no more than two years in jail or a house of correction or by a fine of not more than $100. See *Lewis* v. *Robbins*, 13 Allen, 552.

In the Revised Laws of 1902 provision for jurisdiction over petty larceny in the police courts and similar courts was continued (Revised Laws, 1902, c. 160, sec. 28) with the value of the property stolen increased from $50 to $100. That revision also eliminated punishment in the state prison for larceny of property not exceeding $100 in value, and established the present penalty (Revised Laws, 1902, c. 208, sec. 26). Jurisdiction was also continued in these summary courts and in a trial justice in cases of theft of property not exceeding $5 in value. They could impose punishments up to a $15 fine or six months in the house of correction. Revised Laws, 1902, c. 208, sec. 30. See *Commonwealth* v. *Gately*, 203 Mass. 598. In the revision of the laws of 1921 the police courts were abolished* and jurisdiction over all petty larceny, regardless of amount, was lodged in the District Courts, including the Third District Court of Eastern Middlesex, which tried the theft here involved.

The treatment of petty larceny as a trivial offense was not confined to Massachusetts. In Connecticut in 1784 the petty thief was classed with "the peddler and hawker" and subject to a 40 shilling fine by a justice of the peace. Frankfurter & Corcoran, "Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury," 39 Harv. L.R. 917, at 943. In *District of Columbia* v. *Clawans*, 300 U.S. 617, at 626, Justice Stone enumerated (in note 4) colonial laws

*Trial justices with jurisdiction over larceny of property not exceeding $10 had been limited to twelve towns (none within the jurisdiction of the Third District Court of Eastern Middlesex) by the Acts of 1917, c. 326, sec. 1. Trial justices were abolished by the Acts of 1953, c. 319, sec. 1.

imposing penalties up to six months' imprisonment for petty offenses. Among the laws there listed is chapter 40 of the Laws of 1785 of New York, which had as its purpose "Altering the mode of punishment in certain cases of petty larceny." See also Frankfurter & Corcoran, Appendix A, 39 Harv. L.R. 916, at 983.

It is true that the courts in the middle of the 19th Century have treated petty larceny as a felony (erroneously following Blackstone) in applying such technical rules as those regarding the competency of witnesses. *Commonwealth* v. *Keith*, 8 Met. 531. But the extreme technicality and irrelevancy of these rules seem obvious from such a case as *Utley* v. *Merrick*, 11 Met. 302, where a conviction of obtaining property under false pretenses was held not to disqualify a witness, although that seems just the type of crime which *Jordan* v. *De George*, 341 U.S. 223, intends to include within the ambit of moral turpitude. Cf. *Ex parte Wilson*, 114 U.S. 417, at 423. The rule regarding the disqualification of witnesses has been abolished in Massachusetts (see General Laws, c. 233, sec. 21) and all misdemeanors are treated alike in their bearing on credibility. See *Rosen* v. *United States*, 245 U.S. 467.

Not only legislatures, but others who have dealt with crime have distinguished petty larceny from serious crimes. Thus the Bureau of the Census in 1904 in the Census of Prisoners and Juvenile Delinquents in Institutions, p. 28, classifies petty larceny as a minor crime, stating with respect to its classifications:

> "All crimes that are universally held to be of a grave nature, regardless of how they happen to be punished in individual instances have invariably been classified as major offenses. Among them are the most aggravated forms of offense against chastity . . . perjury, counterfeiting and various violations of the United

States laws, all the specified crimes against the person, and arson, burglary, forgery and embezzlement among the specified crimes against property. *The rule has been followed of classifying larceny and a number of other offenses which may or may not be of a serious nature as minor offenses when the term of imprisonment was not for more than one year.*"* (Emphasis ours.)

This statement is quoted by the Immigration Commission in its Report on Immigration and Crime, 36 Reports of the Immigration Commission, p. 215, Senate Document 750, 61st Cong., 3d Sess. 1910. The reports of this Immigration Commission, it is stated by the Government in its brief in *Jordan* v. *De George,* p. 11, were the basis for the Immigration Act of 1917, which for the first time provided for deportation of aliens convicted of crimes involving moral turpitude.

Jerome Hall has pointed out that petty larceny is not regarded as a serious crime. Hall, Theft, Law and Society (1st ed.) pp. 307-308. He states at page 307:

> "It is necessary here only to point out that, whatever effect is produced on the public by the theft of very large sums of money, it is certain that—to state it rather directly—no wave of moral indignation surges forth when petty thefts are committed."

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*The Federal Bureau of Investigation in its Uniform Crime Reports also makes a distinction between larceny over $50 and larceny of $50 or less. This, however, may not be of particular significance since the offenses enumerated by the F.B.I. are used primarily because they are generally reported by the victim, while such offenses as fraud, forgery and sex offenses are not so generally reported. Ronald H. Beattie, Manual of Criminal Statistics, 1950, prepared for the Committee on Research and Planning, American Prison Association, p. 6.

There have been very few cases, so far as we could find, in which it appears that a court has actually permitted the deportation of an alien on the basis of a conviction of petty larceny. The only Circuit Court of Appeals case we have been able to find is *Tillinghast* v. *Edmead*, 31 F. (2d) 81, in the First Circuit, in which Judge Anderson dissented, agreeing with Judge Morton of the District Court, who had also taken the position that petty larceny does not necessarily involve moral turpitude. *Ex parte Edmead*, 27 F. (2d) 438. The only other cases we have been able to find are three cases in the Western District of New York: *United States ex rel. Chartrand* v. *Karnuth*, 31 F. Supp. 799; *United States ex rel. Fracassi* v. *Karnuth*, 19 F. Supp. 581, 1937; and *United States ex rel. Patricola* v. *Karnuth*, 9 F. Supp. 961, 1935—and one case in the Southern District of New York: *United States ex rel. Amato* v. *Commissioner*, 18 F. Supp. 480, 1937.*

Tillinghast v. *Edmead* merely follows Blackstone's classification of *malum in se* and *malum prohibitum*—a distinction which this court in *Gibbs* v. *Consolidated Gas Co. of Baltimore*, 130 U.S. 396, at 412, said has "long since been exploded." See *Jordan* v. *De George*, 341 U.S. 223, 237, note 10. Indeed, Blackstone himself is not consistent in his treatment of theft. See Note: "The Distinction between 'Mala Prohibita' and 'Mala in Se' in Criminal Law," 30 Col. L.R. 74, at 85, note 75. The irrelevance of Blackstone's distinction is striking when it is noted that he apparently classifies drunkenness as *malum in se*. 4 Blackstone, 42.

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*In *Wilson* v. *Carr*, 41 F. (2d) 704 (C.C.A. 9th), and *United States ex rel. Rizzio* v. *Kenney*, 50 F. (2d) 418 (D.C. D. Conn.), aliens were held not deportable for other reasons, the courts assuming with little or no discussion that petty larceny of which they had been convicted was a crime involving moral turpitude. There are also a few exclusion cases holding that petty larceny is a crime involving moral turpitude. See *United States ex rel. Ulrich* v. *Kellogg*, 30 F. (2d) 984 (App. D.C.)

The Board of Immigration Appeals has referred to petty larceny as a "minor infraction" (*In the Matter of V— I—*, 3 I. & N. Dec. 571, at 573, but has held that it involves moral turpitude, probably on the theory that the turpitude somehow inheres in the intent. The Hornbook definition of larceny includes, of course, "the intent unlawfully to deprive the [owner] permanently of the use of it." *Rich* v. *United Mutual Fire Insurance Co.*, 328 Mass. 133. General Laws (Ter. Ed.) c. 277, sec. 39. But that is a bare intent to do the prohibited act—in this case to pilfer a dozen golf balls (Holmes, Common Law, pp. 70-72 (Boston, 1881)), and it is this act which must be evaluated. *United States ex rel. Iorio* v. *Day*, 34 F. (2d) 920, at 921 (C.C.A. 2d). *United States* v. *Perplies*, 165 F. (2d) 874 (C.C.A. 7th). The act, moreover, must be judged by the statute forbidding it and the court record (R. p. A57). These and only these must indicate its character. *United States ex rel. Guarino* v. *Uhl*, 107 F. (2d) 399 (C.C.A. 2d). *United States ex rel. Manzella* v. *Zimmerman*, 71 F. Supp. 534 (D.C. E.D. Pa.) (and cases cited). *United States ex rel. Giglio* v. *Neelly*, 208 F. (2d) 337 (C.A. 7th).

Larceny generally, and even petty larceny, may conceivably be an atrocious crime, but it may also be committed by a person who takes another's property in payment of a small debt though knowing that the specific property does not belong to him. *Commonwealth* v. *Stebbins*, 8 Gray, 492, 496. From the record in this case there is no way of telling where in the moral scale the pilfering of twelve golf balls stands. But the cases cited above indicate it must be judged by the most venial of crimes within the gamut covered by the statute.

The futility of trying to work out a general definition of moral turpitude that will not be vague and unworkable is pointed out in the dissenting opinion of Justice Jackson in *Jordan* v. *De George*. The court in that case did not attempt

such a definition but saved the phrase "moral turpitude" from this attack by carving out a category of crimes—those involving fraud—which, it held, were encompassed within that term. The crimes in issue in that case were felonies involving large amounts, so that it would appear that, whatever else moral turpitude means, felonies involving fraud are crimes involving moral turpitude.

The category thus carved out obviously does not include petty larceny; and, it is submitted, no such category can be carved out to include petty larceny which will be consistent with Congressional intent and based on a formula certain enough so that an alien will know the terrible sanction which will accompany his misstep and so that an alien brought before a state or federal court on a criminal charge can tell whether he can plead guilty and accept a relatively light sentence without fear of deportation, or whether (if the Government's contention as to the meaning of "conviction" is upheld) he can safely allow a charge to be disposed of by a finding of guilt and probation. Further, such a formula must provide a guide for lower courts as well as the executive branch.

The lack of an objective criterion will be much more serious if the view of the court below is adopted that a sentence to imprisonment is no longer required under the Immigration and Nationality Act. Previously, whatever moral turpitude might mean, a crime on which deportation could be based had to be of such a nature as to impel a court actually to impose a sentence of at least one year's imprisonment. *United States ex rel. Robinson* v. *Day*, 51 F. (2d) 1022 (C.C.A. 2d). But on the interpretation of "convicted" urged by the respondent the crimes hereafter coming before the courts for analysis in deportation proceedings will include a host of minor delinquencies which trial courts have not even felt to require punishment.

The Government in its brief in *Jordan* v. *De George* (pp. 9, 10) suggests that Congress, when it first introduced the

phrase "moral turpitude" into the immigration laws, meant infamous crimes. As the Government there indicates, the Act of March 3, 1891, 26 Stat. 1084, directed the exclusion of "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude." The Government pointed to the accompanying House Report 3808, 51st Cong. 2d Sess. p. 2, which stated that the bill barred "persons who have been convicted of felony or other infamous crimes."

But the quality or character of the crime is determined by the punishment. *United States* v. *Moreland*, 258 U.S. 433, at 437. "Whether a crime is infamous within the meaning of the Fifth Amendment may be determined by the character of the punishment or by other incidents of the sentence prescribed" (p. 442). Rule 7(a) of the Rules of Criminal Procedure prescribed by this court, 323 U.S. 821, provides that crimes punishable by imprisonment not exceeding one year may be prosecuted by information and therefore are not infamous crimes. But when these rules were promulgated, the larceny of property not exceeding $50 in value of the United States (18 U.S.C. (1940 ed.) sec. 82) or within the jurisdiction of the United States (18 U.S.C. (1940 ed.) sec. 466; *cf.* Title 22, sec. 2202, District of Columbia Code (1951 ed.) or from a national or other such bank (12 U.S.C. (1940 ed.) sec. 588b(a)) was punishable by imprisonment not exceeding one year. This court in effect thus held that such petty larceny was not an infamous crime. In 1948, when Congress revised the Criminal Code, it confirmed the distinction raising the dividing point between petty and grand larceny to $100. 18 U.S.C. sec. 641. 18 U.S.C. sec. 661. 18 U.S.C. sec. 2113(b). *Cf.* Title 22, sec. 2202, District of Columbia Code, as amended by the Act of June 29, 1953, 67 Stat. 99. This is precisely the distinction made in the Massachusetts statute under which the petitioner was prosecuted. General Laws c. 266, sec. 30.

Indeed, from the analyses in *District of Columbia* v. *Clawans*, 300 U.S. 617, and Frankfurter & Corcoran in 39 Harv. L.R. 917, it would seem that petty theft is the type of offense which Congress could, consistent with article III, sec. 2, cl. 3, of the Constitution, treat as a petty offense rather than a "crime." *District of Columbia* v. *Colts*, 282 U.S. 63.

The Government in its brief in *Jordan* v. *De George* (p. 6) also suggests that crimes involving moral turpitude are "serious penal offenses." This is hardly sufficient to warn the alien or provide a standard for administrators and courts. See *Jordan* v. *De George*, dissenting opinion, at page 235. However, the legislative history of the Immigration Act of 1917, which first made crimes involving moral turpitude grounds for deportation, indicates that Congress did not intend to include trivial offenses. The Senate Report No. 352, 64th Cong., 1st Sess., in commenting on this new provision for deportation of aliens, states:

> "When the act was passed as H.R. 6060 it contained a new provision (still retained, p. 43, lines 1-6) for the deportation of aliens who commit serious crimes within five years after entry . . . As the act now stands, the House has added, at the suggestion of its committee (volume 53, CR pp. 5932-3) a provision intended to reach the alien who after entry shows himself to be a criminal of the confirmed type, such aliens to be deported without limitation of time after entry when they commit a second *serious* offense." (Emphasis ours.)

This was the understanding throughout the debate on the present Immigration and Nationality Act. The main criticism of the bill reported by the Senate Committee on the Judiciary, S. 2550, with respect to deportation of crim-

inal aliens was the provision (at page 109) making deportable (in addition to those convicted of crimes involving moral turpitude) aliens "convicted in the United States of any criminal offense not comprehended within any of the foregoing, if the Attorney General in his discretion, concludes that the alien is an undesirable alien of the United States."

The objections to this provision were precisely that it would make deportable aliens who had been convicted of minor crimes. Senator Humphrey, one of the leaders of the opposition to the bill, introduced an amendment which was accepted by Senator McCarran (98 Congressional Record, p. 5758) restricting deportability of criminal aliens to those convicted of crimes involving moral turpitude. It is clear that he and his supporters thought that the use of this phrase barred and would continue to bar deportation for minor crimes. In the debate the following colloquy occurs (98 Congressional Record, 5316):

> "Mr. Lehman: Does not the senator from Minnesota agree that under the McCarran bill a crime involving moral turpitude need not be the basis for such deportation but any minor crime or misdemeanor would be sufficient. . . .
>
> "Mr. Humphrey: That is correct. Mr. President, this provision of the bill is a scandalous one."

Senator Kefauver, whose Crime Commission had been investigating crime among the foreign born, joined Senator Humphrey in opposing the original provision in S. 2550 on the ground that it permitted deportation for crimes which were not felonies. It was his understanding that "crimes involving moral turpitude" meant felonies. Cf. *United States* v. *Perplies*, 165 F. (2d) 874 (C.C.A. 7th) (Minton, J.). Senator Kefauver stated (98 C.R. p. 5334):

"We found recently as set forth in the report of the Crime Investigating Committee that there were provisions of law requiring that a person be convicted of two felonies before he could be deported from the United States. The committee recommended that conviction of one felony plus a finding by the attorney general that there was no likelihood of the person becoming a good citizen should be sufficient for purposes of deportation.

"However, as I understand, the pending bill goes much further and provides that if a person is convicted of any kind of crime he may be deported." *

But whatever the explanation of moral turpitude, it seems clear from the legislative history of the revision of the Criminal Code in 1948, 18 U.S.C., that Congress did not intend that phrase to include petty larceny not exceeding $100. In that revision Congress classified all crimes into three classes. Two of these classes are felonies—offenses which "become a very serious matter for society." Representative John M. Robison, at the hearings before subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on H.R. 1600 and H.R. 2055, 80th Cong. 1st Sess. p. 4. For the most serious of these offenses, prison penalties exceeding five years were established. For the class of lesser felonies (including simple larceny of property over $100 within the territorial jurisdiction of the United States, 18 U.S.C. sec. 661) Congress with minor exceptions established maximum prison penalties of five years. For crimes which Congress considered minor, it assigned a maximum prison penalty of one year. The revisor's notes, page A4, Appendix to House Report No. 304, 80th Cong., describes this classification as follows:

*See also 98 Congressional Record, p. 5212.

"Reconciliation of punishment provisions.—A comparative study was made of the penalty provisions of all offenses enumerated in part I of this title. In attempting to reconcile inconsistent and incongruous punishments for offenses involving the same degree of moral turpitude, the following criteria were generally observed.

"1. Heinous felonies: For a felony involving a high degree of moral turpitude, such as treason, murder, kidnapping, robbery, etc., a severe penalty was considered justified.

"2. Ordinary felonies: For a felony involving a lesser degree of moral turpitude than a heinous felony, a maximum imprisonment of 5 years was adopted. At present numerous statutes, such as the National Motor Vehicle Theft Act and the White Slave Traffic Act, carry the 5-year imprisonment penalty, while fraud, filing false statements, etc. carry a 10-year imprisonment penalty. These discrepancies seem incongruous, especially when it is remembered that the maximum penalty is rarely imposed.

"3. Offenses mala prohibita: For violations of regulatory statutes, constituting mala prohibita, a maximum imprisonment penalty of 1 year seemed adequate. This prevents the stigma and consequence of a felony conviction from attaching to the defendant and, on the other hand, would facilitate and expedite prosecutions by making it possible to prosecute by information. Moreover, juries frequently are reluctant to convict any defendants if they know the potential maximum penalty is excessive, although it is seldom imposed in actual practice."

Thus, among the crimes which, Congress felt, did not involve any moral turpitude at all, and therefore were as-

signed maximum imprisonment penalties of one year, is included precisely the type of petty larceny which the Government seeks to use as a basis for deportation. As set out above, Congress in this revision of the Criminal Code made theft of property not exceeding $100 in value punishable by a maximum imprisonment penalty of one year if the property was stolen within the territorial jurisdiction of the United States (18 U.S.C. sec. 661; *cf.* Code of District of Columbia, Title 22, sec. 2202, as amended) or even if it was stolen from the United States (18 U.S.C. sec. 641) or from a national or other such bank (18 U.S.C. sec. 2113(b)). Congress did not even feel that the disabilities flowing from a felony conviction should apply to such pilfering.

It is submitted that, particularly in the light of the Criminal Code, something more definite than the phrase "moral turpitude" is required to impute to Congress an intent to impose the penalty of banishment on the basis of minor infractions of this type. The Government in its brief in opposition, p. 13, admits that its interpretation could lead to "harsh and oppressive results." Indeed, the penalty is so disproportionate to the offense (cf. *Weems* v. *United States*, 217 U.S. 349) that the Government's interpretation raises the question whether the alien would not be subjected to cruel and unusual punishment in violation of the Eighth Amendment or of due process insofar as it includes the principles of the Eighth Amendment.

III.

Section 241(a)(4) of the Immigration and Nationality Act is not applicable to crimes and convictions which occurred before the effective date of the Act.

"Is convicted" in section 241(a)(4) is a specific prospective designation precluding retrospective interpretation of

this provision. This court has so held in construing similar language in the immigration laws, *Kessler* v. *Strecker*, 307 U.S. 22, and elsewhere, *Wallace* v. *Cutten*, 298 U.S. 229.

Kessler v. *Strecker*, moreover, alerted Congress to this specific problem and directly resulted in the amendment of the immigration laws. See *Bridges* v. *Wixon*, 326 U.S. 135.

Eichenlaub v. *Shaughnessy*, 338 U.S. 521, also indicates that a proper method of accomplishing retrospectivity is to use the words "have been or may hereafter be convicted," and this language is used in subsection 241(a)(17).

With these two cases in mind, it seems difficult to believe that, if Congress had intended a retrospective interpretation, it would not have used the language of subsection 241(a)(6) or 241(a)(7)—"is or at any time after entry has been"—or the language of subsection 241(a)(5) and subsection 241(a)(11)—"has been convicted"—or even subsection 241(a)(14), (15) and (16)—"shall have been convicted"—or the language of subsection 241(a)(17). In those sections the use of the past tense is understandable, since Congress was merely continuing in effect existing law. But in section 241(a)(4) Congress had made some changes—more or less drastic, depending upon whether our interpretation or that of the court below is accepted. Prospective operation is understandable in this subsection.

The court below points to the omission of the word "hereafter" in subsection 241(a)(4). "Is," however, when used in other subsections alone, without "hereafter," is still prospective. Thus in section 241(a)(11) "is, or hereafter at any time after entry has been, a narcotic drug addict" was, as the respondent conceded in the court below, intended to operate prospectively only. See House Report 1365, 82d Cong. 2d Sess. U.S. Code Congressional and Ad-

ministrative News, p. 1716; Senate Report 1137, 82d Cong. 2d Sess. p. 22. Here, "is" standing alone in the first part of the clause cannot mean "was heretofore."

The court below calls it an unlikely assumption that Congress would make certain future conduct the basis for deportation without making deportable similar conduct in the past. But that is exactly what Congress did in section 241(a)(11). Aliens who after the effective date of the Act have become drug addicts are deportable, even after they are cured, but aliens who became drug addicts before the effective date of the Act and were cured before that date are not deportable.

Nor is section 241(d) applicable. That section applies "except as otherwise specifically provided"; and Congress here deliberately, after *Kessler* v. *Strecker*, uses the present tense where it could easily have used the past, in a section where there are a multitude of tense distinctions and where "is" standing alone in section 241(a)(11) is used prospectively. If section 241(d) can operate to modify subsection 241(a)(4), it is a virtual invitation for the executive and judiciary to modify the subsections of section 241(a), picking and choosing as to which will operate retrospectively and which prospectively without reference to the language used. This, it is submitted, the Constitution itself forbids. *Wallace* v. *Cutten*, 298 U.S. 229.

Moreover, the primary purpose of section 241(d) seems to be to make sure that the Act covers aliens who entered before its effective date. The first part of section 241(d) was included in section 19(b) of the Immigration Act of 1917. The addition of the second part on which the court below relies is not mentioned anywhere in the legislative history among the changes made. The inference would be that the second part was merely meant to reinforce the first part. Thus in section 241(a)(2), making deportable an alien who had entered the United States without in-

spection, the second part makes certain that the "without inspection" will not be read prospectively, and thus make the entry read prospectively.

There are also other ambiguities which section 241(d) may have been enacted to cope with. Thus, apart from section 241(d) it is not clear that the past tenses, *e.g.*, section 241(a)(5) "has been convicted," refer to convictions before the effective date of the Act as well as before the deportation proceedings commenced.

Moreover, the interpretations here suggested harmonize section 241(d) with section 405(a), which provides in substance that, as to all "liabilities" or "acts" or "matters" before the effective date of the Immigration and Nationality Act, the old law shall apply unless "otherwise specifically provided." Thus, if the petitioner in the future is sentenced to more than one year for a single crime involving moral turpitude, he may be deportable under section 19(a) of the Immigration Act of February 5, 1917.

The legislative history also indicates that Congress intended section 241(a)(4) to apply prospectively. It is of some significance that in both the House and the Senate Reports (S.R. 1137, 82d Cong. 2d Sess. p. 21, and H.R. 1365, U.S. Code Congressional and Administrative News, 1952, p. 1715) the discussions of section 241(a)(4) use the present tense, never slipping into the past tense as would have been natural. Moreover, Representative Walter, who presented the bill in the House, indicates that the only new retrospective provision in the bill is section 241(a)(2) and that the other provisions which operate retrospectively were merely continuations of the old law. On the floor of the House (98 Congressional Record, pp. 4301-4302, April 23, 1952, 82d Cong. 2d Sess.) he read a protest against the bill from the C.I.O. which stated:

> "By abolishing existing statutes of limitation and by creating and making retroactive new grounds for

deportation HR 5678 jeopardizes the status of the resident foreign born including immigrants whose admission into the United States under the Displaced Persons Acts was authorized by Congress and supported by the C.I.O."

Representative Walter commented as follows:

"Of course, HR 5678 does not do that. The Internal Security Act does and the Internal Security Act is a part of the law of the land today. It is restated, that is true, in this bill. This is because we are trying to put together for the first time since 1802 all the statutes relating to immigration and naturalization. It does, however, cover the situation where an alien succeeds in hiding in the United States. If that man is successful for five years his status can be adjusted. Your committee felt this was wrong. We felt that there should not be a premium placed on the ability of an alien to conceal himself. Under the provisions of this new bill where such a situation exists that alien is deportable."

IV.

THE COURT BELOW SHOULD HAVE DECLARED THE DEPORTATION ORDER VOID BECAUSE IT WAS BASED ON PROCEEDINGS CONDUCTED IN VIOLATION OF PROCEDURAL DUE PROCESS AND OF THE REQUIREMENTS OF THE IMMIGRATION AND NATIONALITY ACT AND THE REGULATIONS ISSUED THEREUNDER.

Because the court below reached the conclusion that the alien was deportable as a matter of law, it refused to consider that the deportation order is based on proceedings which violated the requirements of procedural due process

as well as the procedural requirements of the Act and Regulations. But the question before the court was whether the order of deportation was valid, not whether the petitioner was deportable. The petitioner has the right to have that latter question determined by the Special Inquiry Officer (8 C.F.R. sec. 242.61) acting as a judicial, not an investigating officer (sec. 242(b) of the Act).

The Special Inquiry Officer did not, in fact, consider he was acting in a judicial capacity. For example, he asked (R. p. A17) how many times the petitioner had been arrested. On objection by counsel he stated:

> "A deportation hearing has the intent of determining whether or not the respondent is deportable on the charge contained in the warrant of arrest or under any charge contained within the provisions of the Immigration and Nationality Act."

The Special Inquiry Officer placed in the record Federal Bureau of Investigation reports (Exhibits 4 and 4(a), R. pp. A45, A50) containing "investigative leads" (R. p. A25), and overruled objections to these reports (R. pp. A24, A33) on the ground that they were "cumulative evidence" (R. p. A25). He also admitted Exhibit 3, a report of the petitioner's criminal record (R. pp. A26, A43). This the Board of Immigration Appeals felt important enough to append to its decision (R. pp. A77, A93).

The Special Inquiry Officer states (R. p. A70) that he considered in his decision "the transcript of hearings and the exhibits made a part of the record." These exhibits were obviously irrelevant and the grossest hearsay. Apart from the violations of the petitioner's right to a fair hearing under the Fifth Amendment, the admission and consideration of these exhibits violated the Regulations which provide that the Special Inquiry Officer "shall conduct a

fair and impartial hearing" (8 C.F.R. sec. 242.53(b)), and "shall exclude from the record any evidence that is irrelevant, immaterial or unduly repetitious" (sec. 242.53(b)), and section 242(b) of the Act providing that "the alien shall have a reasonable opportunity to examine the evidence against him and to cross-examine witnesses presented by the Government," an injunction against hearsay evidence.

Nor is it an answer to say that the questions involved in this proceeding were primarily questions of law. Such questions also require unbiased consideration. This is recognized by every judge of an appellate court deciding only questions of law who has at one time or another disqualified himself. It is obviously impossible to tell the degree to which the Special Inquiry Officer was influenced in his decision by these exhibits, termed by the District Court (R. p. A113) "of a highly incendiary character."

Nor was the result reached by the court below inevitably the result the Special Inquiry Officer had to reach. Indeed, the Special Inquiry Officer seems to have taken a somewhat different view of the applicable law from that which the court took. He seems to have relied on Massachusetts law (R. p. A67), as did the Board of Immigration Appeal (R. p. A77), rather than on a general federal law. An unbiased judicial analysis of Massachusetts law, we submit, would have yielded a finding that the petitioner was not deportable.

Apart from the question of procedural due process, the decision of the court below to refrain from inquiring into the procedural basis of the deportation order is inconsistent with the assumption in *Bilokumsky* v. *Tod*, 263 U.S. 149, "that one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law." See also *Bridges* v. *Wixon*, 326 U.S. 135; *United States ex rel.*

Accardi v. *Shaughnessy*, 347 U.S. 260, and *Handlovitz* v. *Adcock*, 80 F. Supp. 425 (D.C. E.D. Mich.).*

The Senate Judiciary Committee too has indicated its opinion that the courts will participate in the administration of the Immigration and Nationality Act through active enforcement of the Attorney General's Regulations. In Senate Report 1515, p. 624, it is stated with reference to regulations issued by the Attorney General:

> "These regulations have the force and effect of law and are binding upon the immigration authorities. Their non-observance might invalidate the entire hearing even though no actual prejudice to the alien is shown."

Conclusion.

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed with directions that the order discharging the writ of habeas corpus and dismissing the petition be vacated and that the petitioner be discharged.

Respectfully submitted,

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*See *Couto* v. *Shaughnessy*, C.A. 2, decided January 20, 1955, in which the court said: "There is no dispute as to the facts above stated. Obviously the appellant is deportable and the order directing deportation is unassailable *unless there was some fatal defect in the administrative proceedings in which it was entered.*" (Emphasis ours.)

APPENDIX A.

Excerpt from Fifth Report of the Judicial Council* of Massachusetts, 1929, Public Document No. 144 (reprinted in 15 Mass. Law Quarterly (2), December, 1929, p. 29).

4. Definition of Final Conviction in Cases of "Driving under the Influence of Intoxicating Liquor."

The Administrative Committee of the District Courts has requested us to recommend a new section in General Laws, Chapter 90, as finally amended by the Acts of 1928, Chapter 281. Section 24 *inter alia* makes it an offense for a person to operate a motor vehicle while under the influence of intoxicating liquor and requires a magistrate or other officer authorized to receive complaints before reducing a complaint to writing charging a person with having operated a motor vehicle while under the influence of intoxicating liquor to communicate with the office of the

*The Judicial Council is established under General Laws (Ter. Ed.) c. 221, sec. 34A: "There shall be a judicial council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; the chief justice of the municipal court of the city of Boston or some other justice or former justice of that court appointed from time to time by him; one judge of a probate court in the commonwealth and one justice of a district court in the commonwealth and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive council. The appointments by the governor shall be for such periods, not exceeding four years, as he shall determine."

Registrar of Motor Vehicles and inquire as to whether there is in said office any record or other information tending to show that such person has been finally convicted of a like offence by a court or magistrate of the Commonwealth within a period of six years immediately preceding the commission of the offence with which he is charged. It further provides that if it shall appear that such person has been so convicted, the complaint shall contain an averment to that effect specifying the court or magistrate and the date of conviction. There is further provision that in case of a conviction of a person thus operating a motor vehicle, if the offence is committed within a period of six years immediately following a final conviction of like offence, that the case shall not be placed on file or otherwise disposed of except by trial, judgment and sentence according to the regular course of criminal proceeding, nor the sentence be suspended. There is further provision that for the offence of operating a motor vehicle while under the influence of intoxicating liquor committed within a period of six years as aforesaid the punishment shall be not less than one month nor more than two years.

Considerable difficulty has been encountered in the proper interpretation to be given to the words "final conviction" or "finally convicted" as above used. There are a number of statutes where the penalty to be imposed for a second offence is more severe than for a first conviction. In all such cases the averment of the prior conviction in the complaint or indictment is an essential element of the description of the offence. It is necessary that the record of the court showing the prior conviction and the identity of the defendant be proven unless the defendant confesses it. Therefore such court records should show with technical accuracy the prior conviction.

It has been held in *Attorney General* vs. *Pelletier, 240 Mass.*, at pages 310-311, the word "conviction" implies "a

judgment and sentence of the court upon a verdict or confession of guilt" and that "a mere verdict of guilty is not enough."

"Nothing less than a final judgment conclusively establishing guilt will satisfy the meaning of the word 'conviction' as here used."

See likewise *Mariano* vs. *District Court Judge, 243 Mass. 90.*

In this sense there is no final judgment when the sentence is suspended and the defendant placed on probation upon such terms and conditions as the court shall determine with a continuation of the case to a definite date.

See General Laws, chapter 279, section 1, as amended by statute 1924, chapter 175, and *Finer* vs. *Commonwealth, 250 Mass. 493.*

During the probationary period the defendant may be surrendered and dealt with by the court, may be sentenced or some other lawful disposition be made of the case. At the expiration of the period of probation the suspension and probation orders may be further continued, or if it appears that the defendant has fully performed and kept the conditions and "the objects of the probation seem to have been accomplished in such a way as not to require any punishment either for his own reformation or in the interests of the public, the court may finally dispose of the case by dismissal of it."

See *Marks* vs. *Wentworth, 199 Mass. 94. Mariano* vs. *District Court Judge, 243 Mass. 90.*

It seems to follow, therefore, that so long as a defendant is under a suspended sentence and probation he is before the court on a continuance and the case is still a pending one and there can be no record of a final conviction. When the case is ripe for final disposition the court, under and by authority of the cases and statutes above cited, may either

dismiss it, affirm or reduce the sentence or make any other proper disposition that ought to be made. Commonly this disposition has been in effect an order that the probation and suspension orders be revoked and the case filed but certain judges have held and it is believed properly in view of the decisions in this Commonwealth that such a disposition is not a final conviction. It does not seem possible to decide upon a formula which will be satisfactory for the purpose and that will accomplish the end sought. Therefore in order to clarify the situation, the Administrative Committee has recommended as aforesaid that a new section be added, to be inserted after Section 24A, and to be captioned 24B, which we recommend as follows:

Section 24B. For the purposes of Section 24 as amended by Section 1 of chapter 274 of the Acts of 1929, a person shall be held to have been finally convicted of driving a motor vehicle while under the influence of intoxicating liquor if he shall have pleaded *nolo contendere* or shall have been found or adjudged guilty by a Court of competent jurisdiction notwithstanding he shall have been placed on probation with or without sentence or the sentence shall have been suspended or the case placed on file provided always that no appeal or bill of exceptions shall be pending.*

*This recommendation of the Judicial Council was not adopted. By the Acts of 1936, c. 434, sec. 1, which rewrote General Laws (Ter. Ed.) c. 90, sec. 24, it is now provided that probation without sentence or placing a case on file after plea or finding of guilty or plea of nolo on a charge of drunken driving is sufficient for revocation of a driver's license. General Laws (Ter. Ed.) c. 90, sec. 24(1)(*d*). Note that this did not alter the requirement of sentence in the case of revocation of a driver's license for negligent driving, leaving the scene of an accident, etc. General Laws (Ter. Ed.) c. 90, sec. 24(2)(*b*).

APPENDIX B.

Constitutional Provisions, Statutes and Regulations.

United States Constitution, Art. III, Sec. 2, Cl. 3.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

United States Constitution, Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Un' ed States Constitution, Eighth Amendment.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Immigration and Nationality Act, Public Law 414, June 27, 1952.

SECTION 212(a)(9), 66 STAT. 182, 8 U.S.C. SEC. 1182(a)(9).

GENERAL CLASSES OF ALIENS INELIGIBLE TO RECEIVE VISAS AND EXCLUDED FROM ADMISSION

SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

. . . . . .

(9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense), or aliens who admit having committed such a crime, or aliens who admit committing acts which constitute the essential elements of such a crime; . . .

SECTION 241(a), (b) AND (d), 66 STAT. 204-208, 8 U.S.C. SEC. 1251(a), (b) AND (d).

CHAPTER 5—DEPORTATION; ADJUSTMENT OF STATUS

GENERAL CLASSES OF DEPORTABLE ALIENS

SEC. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

(3) hereafter, within five years after entry, becomes institutionalized at public expense because of mental disease, defect, or deficiency, unless the alien can show that such disease, defect, or deficiency did not exist prior to his admission to the United States.

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

(5) has failed to comply with the provisions of section 265 unless he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful, or has been convicted under section 266 (c) of this title, or under section 36 (c) of the Alien Registration Act, 1940, or has been convicted of violating or conspiracy to violate any provision of the Act entitled "An Act to require the registration of certain persons employed by agencies to disseminate propaganda in the United States, and for other purposes", approved June 8, 1938, as amended, or has been convicted under section 1546 of title 18 of the United States Code;

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

. . . . . .

(7) is engaged, or at any time after entry has engaged, or at any time after entry has had a purpose to engage, in any of the activities described in paragraph (27) or (29) of section 212 (a), . . .

(8) in the opinion of the Attorney General, has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry;

(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 248, or to comply with the conditions of any such status;

(10) entered the United States from foreign contiguous territory or adjacent islands, having arrived there . . .

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing . . .

(12) by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 212(a); or is or at any time after entry has been the manager, or is or at any time after entry has been connected with the management, of a house of prostitution or any other immoral place;

(13) prior to, or at the time of any entry, or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law;

(14) at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon . . .

(15) at any time within five years after entry, shall have been convicted of violating the provisions of title I of the Alien Registration Act, 1940;

(16) at any time after entry, shall have been convicted more than once of violating the provisions of title I of the Alien Registration Act, 1940; or

(17) the Attorney General finds to be an undesirable resident of the United States by reason of any of the following, to wit: has been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts or any amendment thereto, the judgment on such conviction having become final, namely: . . . has been convicted of any offense against section 13 of the Penal Code of the United States committed during the period of August 1, 1914, to April 6, 1917, . . .

(18) has been convicted under section 278 of this Act or under section 4 of the Immigration Act of February 5, 1917.

(b) The provisions of subsection (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter.

. . . . . .

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all

aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

SECTION 242(b), 66 STAT. 209, 8 U.S.C. SEC. 1252(b).

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. . . . No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

. . . . . .

SECTION 242(h), 66 STAT. 208, 8 U.S.C. SEC. 1252(h).

(h) An alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement. Parole, probation, or possibility of rearrest or further confinement in respect of the same offense shall not be a ground for deferral of deportation.

SECTION 405(a), 66 STAT. 280, 8 U.S.C. SEC. 1101, NOTE.

SAVINGS CLAUSE

SEC. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, condi-

tions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. . . .

Immigration Act of February 5, 1917.

SECTION 3, 39 STAT. 875.

SEC. 3. That the following classes of aliens shall be excluded from admission into the United States: . . . Persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; . . .

SECTION 19(a), 39 STAT. 889, AS AMENDED BY 54 STAT. 671.

DEPORTATION OF UNDESIRABLE ALIENS GENERALLY

That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; . . . except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; . . . shall, upon the warrant of the Secretary of Labor, be taken into custody and deported: . . . *Provided further,* That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such de-

portation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this act; nor shall any alien convicted as aforesaid be deported until after the termination of his imprisonment: Provided further, That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned, irrespective of the time of their entry into the United States: . . .

[These functions were transferred to the Attorney General by Reorganization Plan V, 54 Stat. 1238.]

SECTION 19(b), 54 STAT. 671.

(b) Any alien of any of the classes specified in this subsection, in addition to aliens who are deportable under other provisions of law shall, upon warrant of the Attorney General, be taken into custody and deported:

(1) . . .

(2) . . .

(3) Any alien who, at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semi-automatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun.

(4) Any alien who, at any time within five years after entry, shall have been convicted of violating the provisions of title I of the Alien Registration Act, 1940.

(5) Any alien who, at any time after entry, shall have been convicted more than once of violating the provisions of title I of the Alien Registration Act, 1940.

No alien who is deportable under the provisions of paragraph (3), (4), or (5) of this subsection shall be deported until the termination of his imprisonment or the entry of an order releasing him on probation or parole.

Act of May 26, 1922.

SECTION 2(e), 42 STAT. 596.

(e) Any alien who at any time after his entry is convicted under subdivision (c) shall, upon the termination of the imprisonment imposed by the court upon such conviction and upon warrant issued by the Secretary of Labor, be taken into custody and deported in accordance with the provisions of sections 19 and 20 of the Act of February 5, 1917, entitled "An Act to regulate the immigration of aliens . . ."

[These functions were transferred to the Attorney General by Reorganization Plan V, 54 Stat. 1238.]

Administrative Regulations Implementing the Immigration and Nationality Act (8 C.F.R.).

Sec. 242.53. . . .

. . . . . .

(b) *Special inquiry officers; general duties.* The special inquiry officer shall conduct a fair and impartial hearing.

No decision of deportability shall be valid unless based upon reasonable, substantial and probative evidence. He shall exclude from the record any evidence that is irrelevant, immaterial, or unduly repetitious. In his discretion, he may exclude from the record any argument in support of objections, but in such event, the respondent may submit a brief in support of objections. . . .

(c) *Special inquiry officers; specific duties.* At the commencement of the hearing under this part, the special inquiry officer shall . . . (4) advise the respondent that he will have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government, . . .

Sec. 242.61. *Decision of special inquiry officer*—(a) *Preparation of written decisions.* . . . the special inquiry officer shall, as soon as practicable after the conclusion of the hearing, prepare a written decision signed by him which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to deportability, . . . The decision shall be concluded with the order of the special inquiry officer as provided in paragraph (c) of this section.

(b) . . .

(c) *Order of special inquiry officer.* The order of the special inquiry officer shall be (1) that the alien be deported, or (2) that the proceedings be terminated, or (3) that the alien's deportation be suspended, or . . .

(d) . . .

(e) *Finality of order.* The order of the special inquiry officer shall be final except when:

(1) . . .

(2) An appeal is taken to the Board of Immigration Appeals.

United States Code, Title 18, Crimes and Criminal Procedure.

§ 1. OFFENSES CLASSIFIED.

Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

. . . . . .

§ 3651. SUSPENSION OF SENTENCE AND PROBATION.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

. . . . . .

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.

. . . . . .

§ 3653. REPORT OF PROBATION OFFICER AND ARREST OF PROBATIONER.

When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

. . . . . .

§ 3655. DUTIES OF PROBATION OFFICERS.

The probation officer shall furnish to each probationer under his supervision a written statement of the conditions of probation and shall instruct him regarding the same.

He shall keep informed concerning the conduct and condition of each probationer under his supervision and shall report thereon to the court placing such person on probation.

He shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid probationers

and to bring about improvements in their conduct and condition.

. . . . . .

Rules of Criminal Procedure.

RULE 7. THE INDICTMENT AND THE INFORMATION.

(a) USE OF INDICTMENT OR INFORMATION.

An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

. . . . . .

RULE 8. JOINDER OF OFFENSES AND OF DEFENDANTS.

(a) JOINDER OF OFFENSES. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

. . . . . .

RULE 32. SENTENCE AND JUDGMENT.

. . . . . .

(b) JUDGMENT. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. . . .

CHAPTER 218.

SECTION 26. District courts shall have original jurisdiction, concurrent with the superior court, of the following offences committed within their respective districts or otherwise made punishable therein: all violations of by-laws, orders, ordinances, rules and regulations, made by cities, towns and public officers, all misdemeanors, except conspiracies and libels, all felonies punishable by imprisonment in the state prison for not more than five years, the crimes mentioned in sections eighteen and nineteen of chapter two hundred and sixty-six, and the crimes of forgery of a promissory note, or of an order for money or other property, and of uttering as true such a forged note or order, knowing the same to be forged, if in either case the sum of money or the value of the property named in such note or orders does not exceed fifty dollars.

. . . . . .

SECTION 38. . . . Subject to any other provisions of law relative to the filing of complaints for particular crimes, district courts may place on file any complaint in a criminal case other than . . .

CHAPTER 265.

SECTION 23. Whoever unlawfully and carnally knows and abuses a female child under sixteen shall be punished by imprisonment in the state prison for life or for any term of years, or, except as otherwise provided, for any term in any other penal institution in the commonwealth.

CHAPTER 266.

SECTION 30. (1) Whoever steals . . . the property of another . . . shall be guilty of larceny, and shall, if the

value of the property stolen exceeds one hundred dollars be punished by imprisonment in the state prison for not more than five years or by a fine of not more than six hundred dollars and imprisonment in jail for not more than two years; or, if the value of the property stolen does not exceed one hundred dollars, shall be punished by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars; . . . [As amended by St. 1945, c. 282, sec. 2.]

CHAPTER 274.

SECTION 1. A crime punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors.

CHAPTER 276.

SECTION 87. The superior court may place upon probation under any of its probation officers any person before it charged with crime and any court may place any person convicted before it in the care of its probation officer for such time and upon such conditions as it deems proper; provided, that no person convicted of a felony by a district court shall be placed on probation by said court in such case if it shall appear that he has been previously convicted of any felony; . . .

CHAPTER 278.

SECTION 18. Whoever is convicted of a crime before a district court or trial justice may appeal to the superior court, and at the time of conviction shall be notified of his right to take such appeal. The case shall be entered in the

superior court on the return day next after the appeal is taken, and the appellant shall be committed to abide the sentence of said court until he recognizes to the commonwealth, in such sum and with such surety or sureties as the court or trial justice requires, . . .

. . . . . .

SECTION 25. The appellant may, at any time before the next sitting of the superior court for criminal business and at any time thereafter if no action shall have been taken by the superior court except continuance, come personally before the court or trial justice from whose judgment the appeal was taken and withdraw his appeal. (As amended by St. 1937, c. 311.)

CHAPTER 279.

SECTION 1. When a person convicted before a court is sentenced to imprisonment, the court may direct that the execution of the sentence be suspended, and that he be placed on probation for such time and on such terms and conditions as it shall fix. . . . [As amended by St. 1934, c. 205, sec. 1.]